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Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~806~~ 28

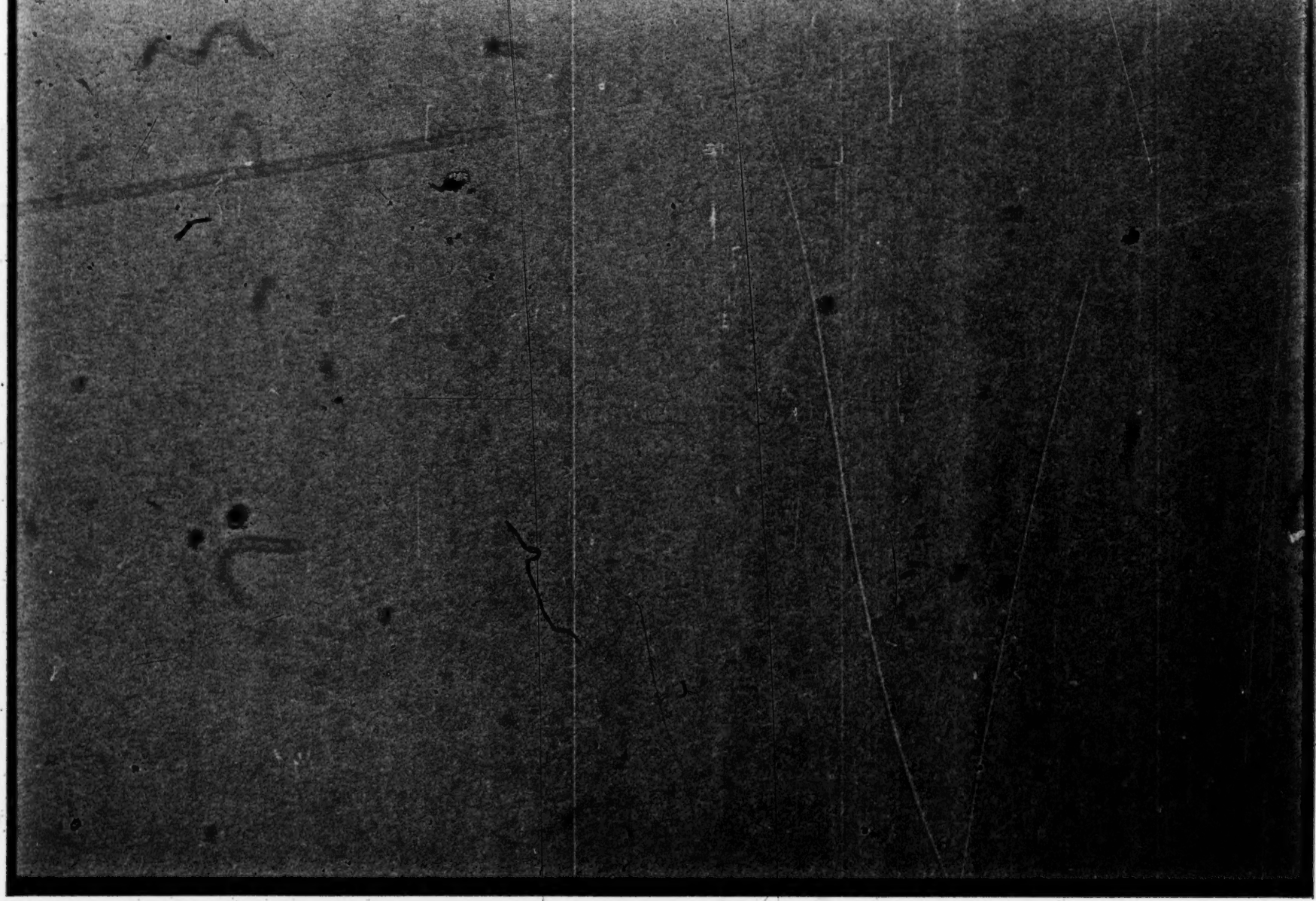
PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF JOHN R. LYNCH, ETC., PETITIONER,

vs.

GEORGE M. PATTERSON, ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 28, 1966
CERTIORARI GRANTED FEBRUARY 27, 1967



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 806

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF JOHN R. LYNCH, ETC., PETITIONER,

vs.

GEORGE M. PATTERSON, ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 14588 and 14589

PROVIDENT TRADESMENS BANK & TRUST CO., Admr. of the Estate of JOHN R. LYNCH, a/k/a JOHN ROBERT LYNCH, Deceased,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, Admx. of the Estate of THOMAS W. SMITH, Deceased,

vs.

LUMBERMENS MUTUAL CASUALTY CO.

and

GEORGE M. PATTERSON, Admr. of the Estate of DONALD CIONCI, Deceased.

Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania.

Appeal from Form of Judgment of the United States District Court for the Eastern District of Pennsylvania.

JOINT APPENDIX—Filed March 4, 1964

[File endorsement omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

1959

June 5. Complaint filed.

June 5. Summons exit.

June 16. Summons returned "on 6/11/59 served" and filed.

June 23. Appearance of Swartz, Campbell & Henry Esqs. for defendant, filed.

June 23. Answer filed.

June 23. Defendant's interrogatories filed.

July 9. Answer to defendant's interrogatories filed.

July 9. Stipulation of counsel amending caption of case and that an amended complaint may be filed, filed.

July 9. Amended complaint filed.

July 9. Summons on amended complaint exit.

July 10. Plaintiff's interrogatories to Lumbermens Mutual Casualty Co. filed.

July 29. Summons on amended complaint returned "on 7-10-59 service accepted by R. Stuart Jenkins, Esq. for Geo. M. Patterson, Adm'r, etc." and filed.

Aug. 10. Answer of George M. Patterson, Admstr. etc. to Amended complaint filed.

Aug. 12. Defendant's answer to plaintiff's interrogatory, filed.

Aug. 26. Stipulation and Order extending time for Lumbermens Mutual Casualty Co. to file answer to amended complaint, filed. 8-26-59 noted. L.

Sept. 17. Answer of Lumbermens Mutual Casualty Co. to amended complaint filed.

Sept. 25. Order to place case on jury trial list filed.

[fol. 2]

Nov. 29. Motion of Lumbermens Mutual Casualty Co. for, Notice of and Order joining John Landis Harris and Sarah B. Smith, Admx. of the Estate of Thomas W. Smith, Dec'd as party plaintiffs, filed. W. 11-30-60 noted & notice mailed.

1961

Apr. 5. Plaintiff's request for admissions to defendants, filed.

Apr. 15. Defendant's admission under Rule 36, filed.

Apr. 27. Answers of Lumbermens Mutual Casualty Co. to request for admissions, filed.

1962

Jan. 2. Plaintiff's pre-trial memorandum, filed.

Jan. 9. Defendant's (Lumbermens Mutual Casualty Co.) pre-trial memorandum, filed.

Jan. 24. Motion of Lumbermens Mutual Casualty Co. to amend its Answer to amended complaint and motion for an order directing the joinder of John Landis Harris and The Est. of Thomas W. Smith dec'd. as party plaintiffs and Order of Court granting motions filed. Noted—notice mailed 1/25/62. HKW.

Feb. 7. Defendant's (George M. Patterson, Admn., etc.) pre-trial memorandum, filed.

Sept. 14. Pre-trial conference, VanDusen J.

Sept. 19. Pre-trial report, Van Dusen, J., filed.

Sept. 19. Order of Court amending caption, filed. 9-20-62 noted. FVD.

Sept. 21. Interrogatory of Provident Tradesmens Bank & Trust Co., Admr. of the Est. of John R. Lynch, etc. to Lumbermens Mutual Casualty Co., filed.

Sept. 21. Motion of Provident Tradesmens Bk. & Tr. Co., etc. for severances of plffs. John Landis Harris,
[fol. 3] et al. Admx. of the Est. of T. W. Smith, dec'd. for purposes of trial, filed.

Sept. 24. Notice of Provident Tradesmens Bk. and Tr. Co. etc. to take deposition of Jack Lynch, etc., filed.

Sept. 26. Answers of Lumbermens Mutual Casualty Co. to plaintiffs' motion to sever, filed.

Sept. 26. Objections of Lumbermens Mutual Casualty Co. to plaintiffs' interrogatory, filed.

Oct. 2. Interrogatory of G. M. Patterson, etc. to Lumbermens Mutual Casualty Co., filed.

Oct. 4. Defendant's objection to interrogatory of G. M. Patterson, etc., filed.

Oct. 9. Argued sur plaintiff's motion to sever defendant's objections to interrogatories. C.A.V. FVD.

Oct. 9. Argued sur defendant's objections to interrogatory of George M. Patterson, Admr. etc. C.A.V. FVD.

Oct. 10. Appearance of Herbert C. Nelson, Esq. for John Landis Harris and Sarah B. Smith, Admx., etc., filed.

Oct. 16. Copy of order re motion of Lumbermens Mutual Casualty Co. to amend answer and for joinder returned "on 10-8-62 served John L. Harris" and filed.

Oct. 16. Copy of plaintiff's amended complaint returned "on 10-12-62 serves Sarah B. Smith" and filed.

Oct. 17. Appearance of Freedman, Landy & Lorry Esqs. as co-counsel for Provident Tradesmens Bank & Trust Co. filed.

Oct. 18. Order of Court sur objections of Lumbermens Mutual Casualty Co. to interrogatories of Provident Tradesmens Bank & Trust Co. filed. Noted —notice mailed 10/19/62. FVD.

Oct. 22. Defendant's supplemental brief contra plaintiffs motion to sever, filed.

[fol. 4]

Oct. 23. Memorandum Opinion Van Dusen, J. and Order DENYING motion of Prov. Tradesmens Bk. and Trust Co., Admr. of the Est. of John R. Lynch, etc. for severances of plffs. John Landis Harris and Sarah B. Smith, Admx. of the Est. of Thomas W. Smith, etc. for purposes of trial without prejudice, filed. 10-24-62 noted & notice mailed. FVD.

Oct. 29. Order of Court amending memorandum opinion, Van Dusen, J. dated 10-23-62, filed. 10-30-62 noted & copies mailed. FVD.

Nov. 2. Plaintiff's motion for re-hearing and reconsideration re motion for severance for trial, filed.

Nov. 9. Order of Court denying plff's motion for rehearing and reconsideration, filed. 11/13/62 Noted & notice mailed. FVD.

Nov. 27. Waiver of alternate jurors, filed.

Nov. 27. Jury called, but not sworn. Wood.

Nov. 28. Jury sworn. Wood.

Nov. 29. Jury present—Jury discharged—case continued. Wood.

Dec. 5. Motion of Lumbermens Mutual Casualty Co. to amend pre-trial memorandum, filed.

Dec. 7. Order of Court sur motion of Lumbermens Mutual Casualty Co. for leave to amend pre-trial memorandum, filed. 12-10-62 noted & copies mailed. FVD.

Dec. 10. Report of supplemental pre-trial conference held 12-7-62, Van Dusen, J., filed. FVD.

Dec. 12. Jury and alternates called, but not sworn. Luongo.

Dec. 13. Jury and alternates sworn. Luongo.

Dec. 13. Trial—witnesses sworn. Luongo.

Dec. 13. Plaintiff's amended pre-trial memorandum, filed.

Dec. 14. Trial resumed. Luongo.

[fol. 5] The court grants motions of Provident Tradesmens Bank & Trust Co., Admr. of Est. of John R. Lynch, etc. and Sarah B. Smith, Admx. of Est. of Thomas W. Smith for directed verdict. Luongo.

Dec. 14. JURY VERDICT: In favor of John Landis Harris against defts., and verdict as directed by the court in favor of Provident Tradesmens Bank & Trust Co., Admr. of Est. of John R. Lynch, etc. and Sarah B. Smith, Admx. of Est. of Thomas W. Smith, and against defts. (judgment to be submitted by counsel). Luongo.

Dec. 14. Motion of Sarah B. Smith, Admx., etc. for directed verdict, filed.

Dec. 14. Motion of Provident Tradesmens Bank & Trust Co., Admr., etc., filed.

Dec. 14. Points for charge of John Landis Harris, filed.

Dec. 14. Points for charge of Lumbermens Mutual Casualty Co., filed.

Dec. 14. Plaintiff's memorandum of law, filed.

Dec. 19. Motion and reasons of Lumbermens Mutual Casualty Co. for new trial, filed.

Dec. 19. Motion of Lumbermens Mutual Casualty Co. for judgment n.o.v., filed.

1963

Mar. 11. Argued sur motion of Lumbermens Mutual Casualty Co. for new trial and for judgment N.O.V. ALL.

Jun. 17. Opinion, Luongo, J. and Order DENYING motions of Lumbermens Mutual Casualty Co. for new trial and for judgment n.o.v., filed. ALL. (Judgment to be submitted by counsel). 6-18-63 noted & notice mailed.

Jun. 17. Memorandum of law of Provident Tradesmens Bank & Tr. Co. contra Lumbermens Mutual Casualty, filed.

[fol. 6]

Jun. 17. Brief of Harris and Smith sur motions for new trial and judgment non obstante veredicto, filed.

Jun. 17. Brief of Lumbermens sur motions for new trial and judgment non obstante veredicto, filed.

Jun. 17. Transcript of December 13 & 14, 1962, filed.

Jul. 9. Order of Court entering Judgment in accordance with the verdict of the jury, filed. ALL. 7-10-63 noted & copies mailed.

Aug. 7. Notice of appeal by defendant, Lumbermens Mutual Casualty Co., filed. Copy to Bayard M. Graf, Esq., Herbert C. Nelson, Esq., Freedman, Landy & Lorry, Esq. and R. Stuart Jenkins, Esq. on 8-7-63.

Aug. 7. Copy of Clerk's notice to U. S. Court of Appeals, filed.

Aug. 7. Bond of Lumbermens Mutual Casualty Co. for costs on appeal in $250. with American Motorists Insurance Co. as surety, filed.

Aug. 7. Notice of appeal by Provident Tradesmens Bank & Trust Co., Admr., etc., filed. Copy to Bayard M. Graf, Esq., Herbert C. Nelson, Esq., R. Stuart Jenkins, Esq., and Swartz, Campbell & Henry, Esq. on 8-8-63.

Aug. 7. Copy of Clerk's notice to U. S. Court of Appeals, filed.

Aug. 28. Record transmitted to United States Court of Appeals.

[fol. 7]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S INTERROGATORIES TO PLAINTIFF—
Filed June 23, 1959

The defendant in the above action, by attorneys Swartz, Campbell and Henry, hereby makes demand that the plaintiff answer the following interrogatories under oath, within twenty (20) days, pursuant to Rule #33 of the Federal Rules of Practice and Procedure:

1. State the names and addresses of all witnesses known to you or to your attorneys with any knowledge whatsoever concerning the conversation in which Edward S. Dutcher

granted limited permission for the use of his automobile on the date of the accident.

Swartz, Campbell & Henry, By W. T. Campbell, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWER TO DEFENDANT'S INTERROGATORIES—
Filed July 9, 1959

Plaintiff, Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased, makes the following Answer to the Interrogatories propounded by Defendant under Federal Rule of Civil Procedure No. 33 upon information and belief, reserving to itself the right to amend, supplement or change said Answer should addi-
[fol. 8] tional information and/or documentary material come into its possession.

1. Edward S. Dutcher, 901 Railroad Avenue, Bryn Mawr, Pennsylvania.

Bayard M. Graf, J. Willison Smith, Jr., Attorneys for Plaintiff.

Duly sworn to by William H. Barwig, jurat omitted in printing.

[fol. 9]

IN UNITED STATES DISTRICT COURT

STIPULATION OF COUNSEL AMENDING CAPTION ETC.—
July 9, 1959

It is stipulated and agreed by and between Bayard M. Graf, Esq., J. Willison Smith, Jr., Esq., Counsel for plaintiff, and Swartz, Campbell & Henry, Counsel for defendant, Lumbermens Mutual Casualty Company, that the caption

of the action heretofore filed under the above Civil Action No. 26455 may be amended to read as above set forth, that the plaintiff may file of record an Amended Complaint for Declaratory Judgment, in accordance with the Amended Complaint attached hereto and that George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, may be joined as additional defendant.

Bayard M. Graf, J. Willison Smith, Jr., Attorneys for Plaintiff.

Swartz, Campbell & Henry, By Lynn L. Detweiler, Attorneys for Defendant Lumbermens Mutual Casualty Company.

[fol. 10]

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT—
Filed July 9, 1959

1. Plaintiff is a corporation incorporated under the laws of the Commonwealth of Pennsylvania, engaged in the banking and trust business with a place of business located at the Southeast corner of Seventeenth and Chestnut Streets, Philadelphia, Pennsylvania and was duly appointed Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased, by the Register of Wills of Delaware County, Pennsylvania, on the Fourth day of March, 1958.

2. Defendant, Lumbermens Mutual Casualty Company, is a corporation incorporated under the laws of the State of Illinois, engaged in the insurance business with a place of business located at 23 South Twenty-third Street, Philadelphia, Pennsylvania.

3. Defendant, George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, is a citizen of the State

of New Jersey, residing at 414 Highland Avenue, Collingswood, New Jersey and was duly appointed Administrator of the Estate of Donald Cionci by the Register of Wills of Delaware County, Pennsylvania on the Second day of July, 1958.

4. Jurisdiction in this case is based upon diversity of citizenship and the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten thousand dollars.

[fol. 11] 5. This action is commenced pursuant to Title 28, U. S. C., Section 2201.

6. On January 17, 1958, plaintiff's decedent was riding as a passenger in a borrowed motor vehicle insured by defendant which was involved in an accident on Bryn Mawr Avenue, Radnor Township, Pennsylvania, as a result of which the said John R. Lynch sustained injuries from which he subsequently died.

7. Plaintiff commenced an action against defendant, George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, whose decedent was the operator of the borrowed motor vehicle, on August 4, 1958 in this Court, known as Civil Action No. 25149, which action is still pending.

8. Defendant, Lumbermens Mutual Casualty Company, has denied liability to plaintiff on the ground that its policy of insurance issued to the owner of the borrowed car does not cover plaintiff.

Wherefore plaintiff demands that the court declare:

1. That the policy of insurance issued by defendant, Lumbermens Mutual Casualty Company, covers the plaintiff as Administrator of the above estate.

2. That plaintiff is entitled to recover damages from defendant, Lumbermens Mutual Casualty Company for injuries to and death of the said John R. Lynch, also known as John Roberts Lynch.

[fol. 12] 3. That the liability of defendant, George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, if any, to plaintiff is covered by the policy of insurance issued by defendant, Lumbermens Mutual Casualty Company.

4. That plaintiff recover its costs.

5. That plaintiff have such other and further relief as is just.

Bayard M. Graf, J. Willison Smith, Jr., Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

INTERROGATORY TO DEFENDANT LUMBERMENS MUTUAL CASUALTY COMPANY—Filed July 10, 1959

The Plaintiff in the above action, by its attorneys, Bayard M. Graf, Esq. and J. Willison Smith, Jr., Esq., hereby make demand that defendant, Lumbermens Mutual Casualty Company answer the following interrogatory under oath, within twenty (20) days, pursuant to Rule #33 of the Federal Rules of Practice and Procedure:

1. State the names and addresses of all witnesses known to you or to your attorneys with any knowledge whatsoever concerning the conversation in which Edward S. Dutcher granted permission of any nature whatsoever for the use of his automobile on the date of the accident.

Bayard M. Graf, J. Willison Smith, Jr., Attorneys for Plaintiff.

[fol. 13]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed August 10, 1959

1. Defendant, George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, admits allegations contained in paragraphs Nos. 1-8 inclusive of Plaintiff's Amended Complaint for Declaratory Judgment.

George M. Patterson, Administrator of the Estate of Donald Cionci, Decd.

R. Stuart Jenkins, Attorney for Defendant, George M. Patterson.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER TO PLAINTIFF'S INTERROGATORY—Filed August 12, 1959

The defendant, Lumbermens Mutual Casualty Company, makes answer to the Interrogatory propounded by plaintiff under Federal Rule of Civil Procedure No. 33, as follows:

1. Edward S. Dutcher, 901 Railroad Avenue, Bryn Mawr, Pennsylvania.

Swartz, Campbell & Henry, By Lynn L. Detweiler, Attorneys for Defendant.

[fol. 14] *Duly sworn to by L. C. Pirrung, Jr., jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

STIPULATION OF COUNSEL—Filed August 26, 1959

It is hereby agreed by and among Bayard M. Graf, Esquire, attorney for the Plaintiff, R. Stuart Jenkins, Esquire, attorney to George M. Patterson, Administrator of the

estate of Donald Cionci, Deceased, and Swartz, Campbell & Henry, Esquires, attorneys for Lumbermens Mutual Casualty Company, that an Answer to the Amended Complaint may be filed on behalf of the defendant, Lumbermens Mutual Casualty Company, at any time prior to September 20, [fol. 15] 1959, with the same force and effect as though it had been filed within twenty days from service of the Amended Complaint.

Bayard M. Graf, Attorney for Plaintiff.

R. Stuart Jenkins, Attorney for George M. Patterson.

Swartz, Campbell & Henry, By W. T. Campbell, Attorneys for Defendant, Lumbermens Mutual Casualty Co.

Approved this 26th day of August 1959.

John S. Lord, Jr.,
J.

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT LUMBERMENS MUTUAL CASUALTY COMPANY TO AMENDED COMPLAINT—Filed September 17, 1959

First Defense.

The complaint fails to state a claim against the answering defendant upon which relief can be granted.

Second Defense.

Defendant admits the allegations contained in paragraphs 1, 2, 4, 5, 7 and 8 of the complaint; and denies each and every other allegation contained in the complaint.

[fol. 16] Third Defense.

There was no coverage under defendant's policy of insurance for the decedent, John R. Lynch, or his administrator.

Fourth Defense.

At the time and place of the accident, the automobile was being driven without the permission of the owner by a person who had no right to drive it.

Fifth Defense.

Plaintiff is not entitled to recover damages from the answering defendant under any circumstances, and is not entitled to an adjudication of a right to damages in this action.

Swartz, Campbell & Henry, By Lynn L. Detweiler,
Attorneys for Defendant, Lumbermens Mutual
Casualty Co.

In United States District Court

Order—November 29, 1960

And Now, to wit, this 29th day of November, 1960, upon consideration of Motion of defendant, Lumbermens Mutual Casualty Company,

[fol. 17] Leave Is Hereby Granted to defendant to join John Landis Harris and Sarah B. Smith, administratrix of the estate of Thomas W. Smith, deceased, as parties plaintiff.

By the Court:

George A. Welsh, J.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, LUMBERMENS MUTUAL CASUALTY COMPANY, FOR ORDER DIRECTING THE JOINDER OF JOHN LANDIS HARRIS AND SARAH B. SMITH, ADMINISTRATRIX OF THE ESTATE OF THOMAS W. SMITH, DECEASED, AS PARTIES PLAINTIFF—Filed November 29, 1960

1. Provident Tradesmens Bank and Trust Company, administrator of the estate of John R. Lynch, also known as John Roberts Lynch, deceased, has brought suit against Lumbermens Mutual Casualty Company and George M. Patterson, administrator of the estate of Donald Cionci, deceased, in a declaratory judgment action to determine questions of coverage of a certain liability policy of defendant, Lumbermens Mutual Casualty Company. Decedent, John R. Lynch, died as a result of an automobile accident which occurred on January 17, 1958 and plaintiff, Provident Tradesmens Bank and Trust Company, administrator of the estate of John R. Lynch, has commenced an action against defendant, George M. Patterson, administrator of the estate of Donald Cionci, deceased, whose decedent was the opera- [fol. 18] tor of the borrowed motor vehicle in question, the action being Civil Action No. 25149.

2. John Landis Harris sustained injuries in the same accident and has brought suit in Court of Common Pleas of Delaware County, No. 1048, December Term 1959 against Edward S. Dutcher, the estate of John R. Lynch, and the estate of Donald Cionci. The same coverage question as exists in the present declaratory judgment action also exists in the claim of John Landis Harris.

3. Thomas W. Smith died as a result of the same accident and Sarah B. Smith, administratrix of the estate of Thomas W. Smith, deceased, has brought suit in Court of Common Pleas of Delaware County, No. 1047, December Term 1959 against Edward S. Dutcher, the estate of John R. Lynch, and the estate of Donald Cionci. The same coverage ques-

tion as exists in the present declaratory judgment action also exists in the claim of Sarah B. Smith.

4. The estate of Thomas W. Smith and John Landis Harris are necessary and proper parties plaintiff to the present declaratory judgment action.

Wherefore, defendant, Lumbermens Mutual Casualty Company, moves this Honorable Court to join John Landis Harris and Sarah B. Smith, administratrix of the estate of Thomas W. Smith, deceased, as parties plaintiff.

Swartz, Campbell & Henry, By William T. Campbell, Jr., Attorneys for Defendant.

[fol. 19]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUEST FOR ADMISSION UNDER RULE 36—Filed April 5, 1961

Plaintiff, Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, requests defendants, Lumbermens Mutual Casualty Company and George M. Patterson, Administrator of the Estate of Donald Cionci, within ten days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following statements is true:

a. Plaintiff's decedent, John R. Lynch also known as John Roberts Lynch, was riding as a passenger at the time of the accident in the automobile owned by Edward S. Dutcher.

b. Donald Cionci, Deceased, was, at the time of the accident, operating the automobile owned by Edward S. Dutcher.

c. The automobile being operated at the time of the accident by Donald Cionci, was owned by Edward S. Dutcher.

d. John R. Lynch, also known as John Roberts Lynch, is deceased.

e. Donald Cionci is deceased.

f. The only living witness known to defendant, Lumbermens Mutual Casualty Company, or its attor-
[fol. 20] neys, with any knowledge whatsoever concerning the conversation in which Edward S. Dutcher granted permission, limited or otherwise, for the use of his automobile on the date of the accident is Edward S. Dutcher.

g. Defendant, Lumbermens Mutual Casualty Company issued a Family Automobile Policy to Edward S. Dutcher accompanied by a Declarations Page Form AA130 properly executed, a true and correct copy of which was furnished to counsel for plaintiff by letter dated October 20, 1959 from counsel for defendant Lumbermens Mutual Casualty Company except for limits of coverage as stated in said letter.

Bayard M. Graf, J. Willison Smith, Jr., Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ADMISSION UNDER RULE 36—
Filed April 15, 1961

Defendant, George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, hereby makes the following admission for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the statements lettered "a" through "g", inclusive, as set forth in "Plaintiff's Request for Admission Under Rule 36", are admitted.

R. Stuart Jenkins, Attorney for Defendant.

[fol. 21]

IN UNITED STATES DISTRICT COURT

DEFENDANT, LUMBERMENS MUTUAL CASUALTY COMPANY'S ANSWER TO REQUEST FOR ADMISSIONS—Filed April 27, 1961

1. (a) Defendant is without knowledge sufficient to admit or deny this statement.

(b) Defendant is without knowledge sufficient to admit or deny this statement.

(c) Admitted as to ownership. Defendant is without knowledge sufficient to admit or deny the averment that the automobile was being operated by Donald Cionci.

(d) Admitted.

(e) Admitted.

(f) Admitted.

(g) Admitted.

Swartz, Campbell & Henry, By: Lynn L. Detweiler, Attorneys for Defendant Lumbermens Mutual Casualty Co.

[fol. 22] *Duly sworn to by L. C. Pirrung, Jr., jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PRETRIAL MEMORANDUM—
Filed January 2, 1962

A. This is a Declaratory Judgment Action under Section 2201 of Title 28 of the U. S. Code. The purpose of the action and relief sought is to respectfully request the Court to declare that the policy of insurance issued by defendant, Lumbermens Mutual Casualty Company, covers Donald Cionci and the Administrator of his estate, George M. Patterson; as such damages are recoverable under such policy.

A separate action was commenced by this plaintiff against George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, for damages arising out of the death of plaintiff's decedent. Although requested on numerous occasions to defend such suit, the Lumbermens Mutual Casu-
[fol. 23] alty Company refused so to do. A judgment by default was there taken. The parties to that action have settled the damage question and the defendant therein has given this plaintiff a judgment note in the amount of $50,000. Thus there is the question in this action as to whether or not Donald Cionci and his estate, the operator of the borrowed vehicle in which both plaintiff's decedent, John R. Lynch, and Donald Cionci were riding prior to each of their deaths, are covered by the policy of insurance issued by Lumbermens.

The policy defines as an insured "any other person using such automobile, provided the actual use thereof is with the permission of the named insured."

It is the contention of counsel that the Lumbermens policy covers Donald Cionci and his estate and that the damages fixed as above are recoverable from defendant Lumbermens.

B. Plaintiff may call as witnesses:

Edward S. Dutcher, 901 Railroad Ave., Bryn Mawr, Pa.
William J. Coady, Radnor Twp. Police

Joseph N. Wineburner, Radnor Twp. Police
Leonard J. McCoy, Radnor Twp. Police
Russell Flemming, Radnor Twp. Police
John Landis Harris, 725 Miller Street, Bryn Mawr, Pa.
Records Librarian, Bryn Mawr Hospital, Bryn Mawr, Pa.
Audry Cionci, Anthony Cionci, Florence Cionci, 837 Penn Street, Bryn Mawr, Pa.
G. Edward Wandling, 25 Summit Ave., Broomall, Pa.
Ralph McCorkle, Sawmill Road, Newtown Square, Pa.
Miss Mathilde Lynch, 22 Broad Street, Nantucket Island, Mass.
Mr. Theophilus S. Lynch, 18 South 37th St,, Phila. 4, Pa.
[fol. 24] Miss Rosamond Lynch, F103 Garden Court Apts., 47th & Pine Streets, Phila. 43, Pa.

and possibly others.

C. The legal issue which will arise at trial will be whether or not there was a general or specific bailment of the borrowed motor vehicle owned by Edward S. Dutcher.

D. It is estimated that two trial days will be required for plaintiff's case.

Bayard M. Graf, J. Willison Smith, Jr., Counsel for Plaintiff.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S (LUMBERMENS MUTUAL CASUALTY COMPANY) PRETRIAL MEMORANDUM—Filed January 9, 1962

A. Summary statement of facts and contentions as to liability. Include diagram on reverse side if required.

Plaintiff's complaint against Lumbermens Mutual Casualty Company for a declaratory judgment asks the Court to declare the policy of automobile liability insurance issued

by it to one Edward S. Dutcher, affords coverage to Donald Cionci, Deceased, who is alleged to have been the driver of Dutcher's automobile on January 17, 1958, when it was involved in an accident which caused the death of plaintiff's decedent, John R. Lynch.

An amended complaint was then filed against both Lumbermens Mutual Casualty Company and George M. Pat- [fol. 25] terson, Administrator of the Estate of Donald Cionci, Deceased.

The defendant, Lumbermens Mutual Casualty Company, filed an answer, and a motion to join John Landis Harris and the Administrator of the Estate of Thomas W. Smith, Deceased, as party plaintiffs.

The motion to join alleges that Harris was injured and Smith was killed as a result of the accident. The purpose of this motion (which was allowed by Judge Welsh) was to bind by any judgment entered, all persons who may have an interest under the defendant's policy.

The defendant denies liability, first of all, because it does not know who was driving Dutcher's automobile at the time of the accident, and secondly, because, if Cionci was driving as it is alleged, he was driving without the permission of the named insured Dutcher.

Defendant also denies liability to the plaintiff, even if it is adjudged that its policy affords coverage to Cionci, for the amount of $50,000 represented by the judgment note alleged to have been delivered by Cionci's administrator to the deceased plaintiff's administrator. Such note, defendant alleges, was given by the administrator of an estate which is insolvent, and without any hope or intention on the part of deceased plaintiff's estate or Cionci's estate that the $50,000 or any part thereof will or ever can be paid. The settlement and delivery of the note were not binding on defendant Lumbermens Mutual Casualty Company.

This defendant does not presently intend to call any witnesses other than those listed in plaintiff's pretrial memorandum. Any witnesses not named or subsequently

discovered, their names will be forwarded promptly to counsel for opposing parties.

[fol. 26] The issue before the Court will be the permission or absence of permission to Cionci by the named assured; whether Cionci was driving the insured vehicle or was responsible for the use thereof at the time of the accident; and the interpretation of defendant's insurance policy.

This defendant desires to amend certain of its pleadings in order to remove several inadvertent discrepancies and has prepared and will file a motion therefor prior to pretrial conference.

One day for defendant Lumbermens Mutual Casualty Co.

Swartz, Campbell & Henry, By: Lynn L. Detweiler,
Attorneys for Lumbermens Mutual Casualty Co.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT LUMBERMENS MUTUAL CASUALTY COMPANY TO AMEND (a) ITS ANSWER TO AMENDED COMPLAINT, AND (b) ITS MOTION FOR AN ORDER DIRECTING THE JOINDER OF JOHN LANDIS HARRIS AND THE ESTATE OF THOMAS W. SMITH, DECEASED AS PARTY PLAINTIFFS—Filed January 24, 1962

The motion of defendant, Lumbermens Mutual Casualty Company, to amend its answer to the amended complaint, and its motion for joinder of additional parties plaintiff, respectfully represents:

[fol. 27] 1. That plaintiff avers in paragraph 5 of its original complaint that plaintiff's decedent was killed in an accident which occurred when he was riding as a passenger in an automobile insured by the defendant, Lumbermens Mutual Casualty Company. Defendant's answer denied this paragraph.

2. That the plaintiff averred in paragraph 6 of its amended complaint that plaintiff's decedent was a passenger

in said automobile. Defendant's answer also denied this paragraph.

3. That the plaintiff averred in paragraph 7 of its amended complaint that said automobile was then and there being operated by one Donald Cionci, Deceased. Defendant, Lumbermens Mutual Casualty Company, inadvertently admitted this averment but the admission was intended to admit the principal averment of the said paragraph that "Plaintiff commenced an action against defendant, George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased . . . on August 4, 1958 in this Court, known as Civil Action No. 25149, which action is still pending."

4. That in paragraph 1 of the motion filed by the defendant, Lumbermens Mutual Casualty Company, to join Harris and Smith as parties, it was mistakenly averred that Cionci was the operator of the vehicle in question.

5. That defendant, Lumbermens Mutual Casualty Company, is in fact without sufficient knowledge to admit or [fol. 28] deny either that the said Lynch was a passenger in, or that the said Cionci, deceased, was the operator of, the vehicle in question, and has so answered in response to requests for admissions filed by the plaintiff.

6. That defendant desires to amend the averments of the pleadings as above stated in order to make consistent denial of knowledge relating to whether Lynch or Cionci was the operator of the vehicle in question.

The defendant, Lumbermens Mutual Casualty Company, therefore moves your Honorable Court to make an order:

(1) permitting it to amend its answer to paragraph 6 of plaintiff's amended complaint to read as follows: "Defendant is without knowledge sufficient to admit or deny the averments of this paragraph that plaintiff's decedent was riding as a passenger in the motor vehicle referred to, and demands due proof thereof";

(2) permitting it to amend its answer to paragraph 7 of plaintiff's amended complaint to read as follows: "Defendant, Lumbermens Mutual Casualty Company, is without knowledge sufficient to admit or deny the averment that Donald Cionci, Deceased, was the operator of the motor vehicle referred to";

(3) permitting defendant, Lumbermens Mutual Casualty Company, to amend its answer to paragraph 1 of its motion for an order directing the joinder of John Landis Harris [fol. 29] and Sara B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased as parties plaintiff, to read as follows:

"1. Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch a/k/a John Roberts Lynch, Deceased, has brought suit against Lumbermens Mutual Casualty Company and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, in a declaratory judgment action to determine questions of coverage of a certain liability policy of defendant, Lumbermens Mutual Casualty Company. Decedent, John R. Lynch, died as a result of an automobile accident which occurred on January 17, 1958, and plaintiff, Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, has commenced an action against defendant George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, the action being Civil Action No. 25149."

Swartz, Campbell & Henry, By R. J. Harburg, Attorneys for Defendant Lumbermens Mutual Casualty Co.

IN UNITED STATES DISTRICT COURT

ORDER—January 24, 1962

And Now To Wit this 24th day of January, 1962, it is hereby Ordered and Decreed that defendant, Lumbermens Mutual Casualty Company's Motion to Amend its Answer to Amended Complaint, and its Motion for an Order Directing the Joinder of John Landis Harris and the Estate of Thomas W. Smith, Deceased, as Party Plaintiffs, is [fol. 30] granted, and the said pleadings are hereby amended to conform with the said Motion.

By the Court,

Wood, J.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S (GEORGE M. PATTERSON, ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, DECEASED) PRETRIAL MEMORANDUM—Filed February 7, 1962

A. George M. Patterson was appointed Administrator of the Estate of Donald Cionci, Deceased, on the second day of July 1958 by the Register of Wills of Delaware County.

B. Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased, brought an action against George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, and Lumbermens Mutual Casualty Company requesting your Honorable Court to declare that the policy of insurance issued by defendant, Lumbermens Mutual Casualty Company, covers Donald Cionci and the Administrator of his Estate, George M. Patterson, as such damages are recoverable under said policy.

C. This defendant does not intend to call any witnesses.

D. The legal issue involved herein is whether or not the policy of insurance issued by Lumbermens to Edward S.

Dutcher, owner of the borrowed vehicle, covers Donald Cionci and his Estate.

[fol. 31] E. It is not contemplated that defendant will present any defense to the instant action.

R. Stuart Jenkins, Counsel for Defendant, George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased.

IN UNITED STATES DISTRICT COURT

PRETRIAL REPORT—Filed September 19, 1962

Date Pretrial Held: 9/14/62 No. on Consolidated List: 150

C.A. No. 26455

Case Title: Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased v. Lumberments Mutual Casualty Company and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased.

1. Trial Counsel: P—Bayard M. Graf, Esq. or Avram G. Adler, Esq.
Additional-P-Harris
Additional-P-Estate of T. W. Smith
Not yet notified of order of 11/9/60 as far as record shows
D-Lumbermens—Lynn L. Detweiler, Esq.
D-Patterson—R. Stuart Jenkins, Esq.

[fol. 32] 2. Amendments: D-Lumbermens will submit order changing caption to add plaintiffs mentioned in order of 11/9/60 and will notify these additional plaintiffs or their counsel within a week. P objects to the entry of any order changing the caption if this will delay the trial of the case. D-Lumbermens adds John

Lynch as witness, his address to be supplied other counsel no later than 9/20/62.

3. Discovery: Interrogatory concerning coverage may be filed within 10 days. P may depose John Lynch within 15 days of receipt of his address.

4. P's Claim: P's decedent killed due to operation by Donald Cionci, deceased, of auto of Dutcher which was insured by D and claims policy covered operation by Cionci under clause providing for coverage, where "actual use thereof is with permission of named insured." Only surviving passenger, Harris, will testify that Cionci was driving. After default judgment, Cionci estate settled damage issue in case by P against Cionci estate based on accident (which suit D was given notice of and requested to defend) by giving judgment note for $50,000. See pretrial memo.

5. D's Claim: D-Lumbermens does not know who was driving and, if it was Cionci, he was not driving with the permission of the insured (Dutcher). No liability on $50,000. note, since it is not binding on the defendant Lumbermens Mutual Casualty Company. D contends that keys given to decedent and he drove car away.

D-Patterson will present no defense.

See pretrial memos.

[fol. 33] 6. Stipulations: Counsel agree that evidence on the issue of the person who was driving the Dutcher car at the time of the accident should be presented to the jury first and this issue should be decided by the jury's answers to special questions. P contends that Cionci was driving and D-Lumbermens contends that Lynch was driving. In the event that the jury decides that Cionci was driving, the trial will continue before the same jury on the remaining issues and evidence will be taken on such issues as whether Cionci was driving with the permission of the insured.

7. Legal Issues: P contends that if Cionci was driving, there will be no evidence to rebut presumption (Exner v. Safeco Ins. Co. of America, 402 Pa. 473, at 477) that driver is acting with permission of Dutcher, since Dutcher is adverse to deceased Lynch and, hence, cannot testify under Dead Man's Rule. All counsel are to submit to the trial judge, as soon as the case is assigned for trial, memoranda of law covering at least the following two points: (a) the presumption in Pennsylvania that a driver is acting with the permission of the owner of the car; (b) the application of the Dead Man's Rule to testimony by Dutcher as to persons to whom he gave permission to take his car.
8. Trial Time: 2½ days.
9. Settlement: In view of the fact that at least three separate claims are involved in the extent of the coverage of the policy, it is unfeasible to settle this case at this time.

Francis L. Van Dusen, J.

[fol. 34]

IN UNITED STATES DISTRICT COURT

LETTER DATED SEPTEMBER 17, 1962

Law Offices
SWARTZ, CAMPBELL & HENRY
Philadelphia National Bank Building
Philadelphia 7

C. Donald Swartz
Wm. T. Campbell
Herbert A. Barton
Lynn L. Detweiler
Joseph Head
William J. McKinley, Jr.
William T. Campbell, Jr.
Richard D. Harburg

Telephone
LOcust 3-9793

September 17, 1962
SEP 18 1962

21692

Honorable Francis L. Van Dusen
2110 U. S. Court House
Philadelphia 7, Penna.

Dear Judge Van Dusen:

Re: Provident Tradesmens Bank and Trust Co., Adm. of Estate of John R. Lynch vs. Lumbermens Mutual Casualty Company, et al.

I am enclosing an Order for your signature, amending the caption of this case to include John Landis Harris and the Estate of Thomas W. Smith, Deceased as parties plaintiffs. If you will be good enough to have your office call me and advise me the day you sign the order I will at once deliver [fol. 35] to the Marshal a copy of the order, copy of all pleadings, and a writ to join, for service on the added plain-

tiffs and their attorneys of record in the trespass actions which they have instituted in Delaware County.

Respectfully yours,

SWARTZ, CAMPBELL & HENRY

By: LYNN L. DETWEILER

LLD:bl

cc: Schroeder, Jenkins & Raymond, Esqs.
Bayard M. Graf, Esq.

IN UNITED STATES DISTRICT COURT

LETTER DATED SEPTEMBER 18, 1962

LAW OFFICES
2124 Philadelphia National Bank Building
Philadelphia
7

J. Willison Smith, Jr.
Bayard M. Graf

Area Code 215
LOcust 3-1530

September 18, 1962
SEP 19 1962

Honorable Francis L. Van Dusen
2110 U. S. Court House
Philadelphia 7, Penna.

Re: Provident Tradesmens Bank and Trust Co. Adm. of Est. of John R. Lynch vs. Lumbermens Mutual Casualty Co., et al.
Civil Action No. 26455

Dear Judge Van Dusen:

We wish to object to the entry of the proposed Order submitted to you by Lynn L. Detweiler, Esquire, with his let- [fol. 36] ter of September 17, 1962 in connection with the above matter.

As we explained at the Pre-trial Conference, the Pennsylvania dead man's rule precludes the defendant insurance carrier from offering evidence to show the circumstances surrounding the lending of the motor vehicle since Plaintiff's decedent is not available to rebut any testimony. Accordingly, the joinder of the parties which defendant seeks to accomplish may seriously damage Plaintiff's case by possibly rendering such testimony admissible.

In view of the foregoing it would be appreciated if you would deny such Order with prejudice. On the other hand if you are of the opinion that you would like to hear argument on the proposed joinder would you kindly request the defendant insurance carrier to prepare and file the appropriate Motion with notice to all concerned so that answer may be made thereto, briefs submitted and argument had thereon.

Respectfully yours,

BAYARD M. GRAF
Bayard M. Graf

BMG/jas

CC: Stuart Jenkins, Esquire
Avram G. Adler, Esquire
Lynn L. Detweiler, Esquire

[fol. 37]

IN UNITED STATES DISTRICT COURT

LETTER DATED SEPTEMBER 19, 1962

UNITED STATES DISTRICT COURT
Eastern District of Pennsylvania
Philadelphia 7

Chambers of
FRANCIS L. VAN DUSEN
Judge

September 19, 1962

Re: Provident Tradesmens Bank and Trust Co.,
Admr. of Estate of John R. Lynch v.
Lumbermens Mutual Casualty Co., et al.
Civil Action No. 26455

Bayard M. Graf, Esq.,
2124 Philadelphia National Bank Building,
Philadelphia 7, Pa.

Dear Mr. Graf:

In answer to your letter of September 18, 1962, I do not see how I can fail to change the caption, which should have been done approximately two years ago when Judge Welsh signed his order of November 29, 1960. Our records indicate that you were given notice of the order entered on November 29, 1960, and, in fact, you stated that you had no objection to the motion at that time. Also, you were notified of Judge Wood's order of January 24, 1962.

As I see it, you have at least two possible courses of action:

(1) File a motion for severance, for purposes of the trial of the actions, of John Landis Harris and Sarah B. Smith, Administratrix, etc., from the action of the Provident Tradesmens because of the reasons stated in the second paragraph of your letter.

(2) File a motion for reconsideration of the orders of November 29, 1960, and January 24, 1962.

[fol. 38] You could file a motion which asks for both types of relief, but it seems clear that your long delay in doing nothing about the November 29, 1960, order makes it only fair that you should have the burden of objecting to an order amending the caption, which merely carries out the terms of the above orders. If you are going to file a motion in this matter, will you please do it promptly (also call my secretary stating that you have done it, since if you ask for reconsideration of the above orders, the matter will have to be listed before Judge Wood as I have no power to interfere with an order entered by him, but, as pretrial judge, I can consider a motion for severances for purposes of trial) so it can be listed for argument as soon as possible?

For the information of all counsel who are receiving copies of this letter, I have deleted everything from the word "and", in line 5 of Mr. Detweiler's order, to the word "caption" since I made a sugestion to Mr. Detweiler for the purpose of making the record clear and consider that he requested me to enter the order, rather than that I made any "order" on such a contested subject. A copy of this letter, of your letter of September 18, and of Mr. Detweiler's letter of September 17, have been stapled to the backer containing Mr. Detweiler's order, which has been filed today.

Very truly yours,

Francis L. Van Dusen, Judge.

FVD:bl

CC. Avram G. Adler, Esq.
Lynn L. Detweiler, Esq.
R. Stuart Jenkins, Esq.

[fol. 39]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF L. C. PIRRUNG, JR.—October 15, 1962

Commonwealth of Pennsylvania }
County of Philadelphia } ss.:

L. C. Pirrung, Jr., being duly sworn according to law, deposes and says that he is Claim Manager of Lumbermens Mutual Casualty Company, and is duly authorized to take this affidavit in its behalf; that Lumbermens Mutual Casualty Company issued its Family Automobile Liability Policy No. WL126-559 to Edward S. Dutcher for the policy period 5/17/57 to 5/17/58; that the said Family Automobile Liability Policy covered the use of a certain 1955 Mercury automobile owned by the said Edward S. Dutcher; that as a result of an accident which occurred on January 17, 1958, involving the insured automobile above referred to, and an automobile owned and operated by one Thomas W. Smith, the said Thomas W. Smith was killed and one John L. Harris was injured; that John L. Harris instituted suit in the Court of Common Pleas of Delaware County, Pennsylvania, at December Term 1959, No. 1048, to recover damages for the injuries sustained in the said accident; said suit was instituted against Edward S. Dutcher, Wilbert M. Massey, Administrator, d.b.n. of the Estate of John R. Lynch, and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased;

That Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased, instituted suit in the Court of Common Pleas of Delaware County at December Term 1959, No. 1047 to recover damages for the alleged wrongful death of the said Thomas W. Smith, Deceased; said suit was [fol. 40] likewise instituted against Edward S. Dutcher, Wilbert M. Massey, Administrator, d.b.n. of the Estate of John R. Lynch, and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased;

That Lumbermens Mutual Casualty Company has acknowledged its responsibility under the terms of the policy above referred to, to afford a defense to the said Edward S. Dutcher and to pay any final judgment obtained against the said Edward S. Dutcher up to the limits of coverage provided in the said policy, and is affording a defense through a law firm selected by Lumbermens Mutual Casualty Company, Lutz, Fronefield, Warner & Bryant, of Media, Pennsylvania, which law firm has entered an appearance for Dutcher in the two suits referred to and is conducting the defense of Dutcher;

That the Family Automobile Policy above referred to contains an exclusion with regard to the damage done to the Dutcher automobile which reads as follows:

"Part I—Liability

"Exclusions

"This policy does not apply under Part I:

"... (g) to injury to or destruction of property owned or transported by the insured, or property rented to or in charge of the insured other than a residence or private garage."

L. C. Pirrung, Jr.

Sworn to and subscribed before me this 15 day of October 1962.

Beatrice G. Lutz, Notary Public, Philadelphia, Philadelphia County, Pa.

(Seal)

My Commission Expires March 3, 1965.

[fol. 41]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WILLIAM F. KEATING—October 17, 1962

Commonwealth of Pennsylvania }
County of Delaware } ss.:

William F. Keating, Esquire, being duly sworn according to law deposes and says that on October 16, 1962 at 10:00 A. M. he personally examined papers filed of record with the Register of Wills of Delaware County in the estate of Donald Cionci, deceased, administration No. 24624, and that that examination disclosed, inter alia, the following facts:

1. That a Petition for Letters of Administration, dated June 24, 1958, by George M. Patterson states that Donald Cionci, the decedent, prior to his death resided at 837 Penn Street, Bryn Mawr, Pennsylvania; that the estimated value of the decedent's personal property was $100.00 and that the decedent had no real property situate within the Commonwealth of Pennsylvania.

2. That pursuant to the aforesaid Petition, Letters of Administration were granted to George M. Patterson on June 24, 1958.

3. That an inventory signed by George M. Patterson, Administrator, and filed July 20, 1962 indicates that the decedent had no assets of any value.

4. An Inheritance Tax Appraisement dated August 15, 1962 indicates that the decedent owned no property subject to Pennsylvania Inheritance Tax.

5. No account had yet been filed.

William F. Keating, Attorney at Law, Delaware County, Pennsylvania.

Sworn to and Subscribed before me this 17th day of October, 1962.

Alberta T. Ives, Notary Public.

My Commission Expires Jan. 28, 1963.

IN UNITED STATES DISTRICT COURT

ORDER AMENDING CAPTION—September 19, 1962

And Now, to wit, this 19th day of September 1962, pursuant to the order of Nov. 29, 1960 (Dec. 15) and order signed by the Honorable Harold K. Wood on January 24, 1962 (Dec. 22) directing the joinder of John Landis Harris and the Estate of Thomas W. Smith, Deceased, as parties plaintiffs in the above entitled action.

It Is Ordered And Decreed that the caption of this case shall read as follows: Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased, John Landis Harris and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased, v. Lumbermens Mutual Casualty Company and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased.

Francis L. Van Dusen, J.

[fol. 43]

IN UNITED STATES DISTRICT COURT

INTERROGATORY OF PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF JOHN R. LYNCH, A/K/A JOHN ROBERTS LYNCH, DECEASED TO DEFENDANT LUMBERMENS MUTUAL CASUALTY COMPANY—Filed September 21, 1962

The plaintiff Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, by its attorneys, Bayard M. Graf, Esquire and J. Willison

Smith, Jr., Esquire, hereby makes demand that the defendant Lumbermens Mutual Casualty Company answer the following interrogatory under oath, within twenty (20) days, pursuant to Rule #33 of the Federal Rules of Practice and Procedure and the Pre-Trial Report of Francis L. Van Dusen, J. filed herein:

1. State the limits of coverage contained in defendant, Lumbermens Mutual Casualty Company Family Automobile Policy issued to Edward S. Dutcher and the accompanying Declarations Page Form AA130 which is the subject of this action.

Bayard M. Graf, J. Willison Smith, Jr., Attorneys for Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, Deceased.

[fol. 44]

IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFF PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF JOHN R. LYNCH, A/K/A JOHN ROBERTS LYNCH, DECEASED FOR SEVERANCES OF PLAINTIFFS, JOHN LANDIS HARRIS AND SARAH B. SMITH, ADMINISTRATRIX OF THE ESTATE OF THOMAS W. SMITH, DECEASED, FOR PURPOSES OF TRIAL—Filed September 21, 1962

The motion of Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, a/k/a John Roberts Lynch, Deceased to sever plaintiffs John Landis Harris and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased for purposes of trial, respectfully represents:

1. The above action was commenced by the moving plaintiff seeking a Declaratory Judgment of coverage under a policy of insurance issued by defendant Lumbermens and

after certain amendments filed by stipulation issue was joined.

2. Subsequently defendant Lumbermens filed a motion to join John Landis Harris and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith as parties plaintiff which joinder was Ordered by Judge Welsh on November 29, 1960.

3. When defendant Lumbermens realized that inconsistent averments had been made in its Answer and, its [fol. 45] aforesaid Motion to join party plaintiffs it filed a Motion to Amend its Answer to the amended Complaint and its Motion for Joinder which Motion was granted by Order of Judge Wood on January 21, 1962.

4. Moving plaintiff's decedent was a party to a three party conversation at which time permission was given to borrow the motor vehicle involved. The only survivor to such conversation is defendant Lumbermen's insured.

5. The Pennsylvania Act of Assembly of May 23, 1887, P. L. 158; 28 P. S. 322 renders defendant Lumbermen's insured an incompetent witness as far as the moving plaintiff is concerned but there is a question as to the admissibility of such insured's testimony as far as the other two plaintiffs who have been joined as parties to this action.

6. In the absence of a severance the trial of this cause by the three joint plaintiffs may result in serious prejudice to the moving plaintiff since its decedent is not available to testify to the factual circumstances surrounding the loan of the insured motor vehicle while on the other hand the testimony of the insured may be admissible as to the other two plaintiffs joined by defendant Lumbermens.

Wherefore, moving plaintiff respectfully moves this Court for purposes of trial to grant a severance of its cause of action from that of the two party plaintiffs, John Landis Harris and Sarah B. Smith, Administratrix of the Estate of

[fol. 46] Thomas W. Smith, Deceased, joined by defendant Lumbermens.

Bayard M. Graf, J. Willison Smith, Jr., Attorneys for Plaintiff Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, Deceased.

In United States District Court

Answer of Defendant Lumbermens Mutual Casualty Company to Motion of Plaintiff Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, A/K/A John Roberts Lynch, Deceased, for Severance of Plaintiffs John Landis Harris and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased—Filed September 26, 1962

The defendant, Lumbermens Mutual Casualty Company, opposes the motion of Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, Deceased, and makes answer to the plaintiff's motion as follows:

1. Admitted.

[fol. 47] 2. Admitted.

3. Admitted.

4. Admitted.

5. It is denied that the assured of defendant Lumbermens Mutual Casualty Company, Dutcher, is an incompetent witness as far as the moving plaintiff is concerned, and averred on the contrary that he is a competent witness as to all plaintiffs.

6. Denied. It is averred that a severance would defeat the purpose of the joinder of John Landis Harris and Sarah

B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased, which joinder was effected for the very purpose of resolving in one trial, as to all parties who may be affected thereby, the question of the coverage of the policy issued by defendant Lumbermens Mutual Casualty Company, and to avoid multiplicity of trials.

Swartz, Campbell & Henry, By Lynn L. Detweiler, Attorneys for Defendant Lumbermens Mutual Casualty Co.

[fol. 48]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S OBJECTION TO PLAINTIFF'S INTERROGATORY—
Filed September 26, 1962

The defendant, Lumbermens Mutual Casualty Company, objects to Interrogatory No. 1 filed by the plaintiff, Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, a/k/a John Roberts Lynch, Deceased, which interrogatory reads as follows:

"1. State the limits of coverage contained in defendant, Lumbermens Mutual Casualty Company Family Automobile Policy issued to Edward S. Dutcher and the accompanying Declarations Page Form AA130 which is the subject of this action."

The defendant, Lumbermens Mutual Casualty Company, avers that the information quoted is irrelevant to the issue in this case.

Swartz, Campbell & Henry, By Lynn L. Detweiler, Attorneys for Defendant Lumbermens Mutual Casualty Co.

IN UNITED STATES DISTRICT COURT

INTERROGATORY OF GEORGE M. PATTERSON, ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, DECEASED TO DEFENDANT LUMBERMENS MUTUAL CASUALTY COMPANY—Filed October 2, 1962

The defendant George M. Patterson, Administrator of the Estate of Donald Cionci, deceased, by R. Stuart Jenkins, Esquire, hereby makes demand that the defendant Lumber-[fol. 49] mens Mutual Casualty Company answer the following interrogatory under oath, within twenty (20) days, pursuant to Rule #33 of the Federal Rules of Practice and Procedure and the Pretrial Report of Francis L. VanDusen, J., filed herein:

1. What are the limits of coverage set forth in Lumbermens Mutual Casualty Company Family Automobile Policy and the accompanying Declarations Page Form AA130 issued to Edward S. Dutcher by the defendant Lumbermens Mutual Casualty Company.

R. Stuart Jenkins, Attorney for George M. Patterson, Administrator of the Estate of Donald Cionci, deceased.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S OBJECTION TO INTERROGATORY OF GEORGE M. PATTERSON, ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, DECEASED—Filed October 4, 1962

The defendant, Lumbermens Mutual Casualty Company, objects to Interrogatory No. 1 filed by the defendant, George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, which interrogatory reads as follows:

"1. State the limits of coverage set forth in Lumbermens Mutual Casualty Company Family Automobile Policy and the accompanying Declarations Page Form AA130 issued to Edward S. Dutcher by the defendant Lumbermens Mutual Casualty Company."

[fol. 50] The defendant, Lumbermens Mutual Casualty Company, avers that the information quoted is irrelevant to the issue in this case.

Swartz, Campbell & Henry, By Lynn L. Detweiler, Attorneys for Defendant Lumbermens Mutual Casualty Company.

IN UNITED STATES DISTRICT COURT

ORDER SUR OBJECTIONS (DOCUMENTS NOS. 29 AND 31) TO INTERROGATORIES (DOCUMENTS NOS. 25 AND 30)—October 18, 1962

And Now, October 18, 1962, after consideration of the foregoing Objections, the attached briefs of counsel, oral argument, and the record, It Is Ordered:

(1) that defendant Lumbermens Mutual Casualty Company's Objection to Interrogatory of plaintiff Provident Tradesmens Bank and Trust Company (Document No. 29) is Sustained to the extent that defendant only need state whether such limits equal or exceed $10,000.00; and

(2) that defendant Lumbermens Mutual Casualty Company's Objection to Interrogatory of defendant Patterson (Document No. 31) is Sustained to the extent that defendant Lumbermens only need state whether such limits equal or exceed $10,000.00.

Francis L. Van Dusen, J.

[fol. 51] This action for a declaratory judgment under 28 U. S. C. A. §2201 asks the court to determine, among other things, that a certain insurance policy issued by defendant Lumbermens Mutual Casualty Company to one Dutcher covers the administrator of the Estate of Donald Cionci, deceased, an additional defendant in this action. A suit is now pending in this court between plaintiff and the Cionci Estate, which the insurance company has refused to defend (Civil Action No. 25149). Plaintiff Provident alleges that

the administrator of the Cionci Estate has given a judgment note in that case in the amount of $50,000.00 as settlement of the damages in that case (see Document No. 19). The interrogatories under discussion ask that defendant insurance company set forth the amount of coverage in the policy it issued Dutcher and the accompanying Declarations Page Form (see Documents Nos. 25 and 30). A copy of the policy which is the subject matter of this suit has already been given to plaintiff Provident, but the amount of the coverage was not set forth in the copy. Defendant Patterson, in his brief, also asked for a copy of said policy, which Lumbermens has agreed to produce, but the objection to answering the interrogatory is still of record.

There is authority both ways on the question of whether or not a plaintiff is entitled to discovery concerning his opponent's insurance coverage.[1] The law is clear, however, in this District that in the usual automobile accident case the [fol. 52] court will not permit discovery as to a defendant's insurance situation. *McClure* v. *Boeger*, 105 F. Supp. 612, 613 (E. D. Pa. 1952).[2]

This case is not directly analogous to the *McClure* case, although certain factors considered by Senior Judge Kirkpatrick in that case are applicable. Here we have an action

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[1] See *Johanek* v. *Aberle*, 27 F. R. D. 272 (D. Mont. 1961) (cases cited at p. 274, fn. 2), as well as *Langlois* v. *Allen*, 30 F. R. D. 67 (D. Conn. 1962); *Hillman* v. *Penny*, 29 F. R. D. 159 (E. D. Tenn. 1962); *Novak* v. *Good Will Grange No. 127, Patrons of Husbandry*, 28 F. R. D. 394 (D. Conn. 1961); *Hill* v. *Greer*, 30 F. R. D. 64 (D. N. J. 1961); *Plyer* v. *Gordon*, 25 F. R. D. 170 (D. N. J. 1960); and *Flynn* v. *Williams*, 30 F. R. D. 66 (D. Conn. 1958).

[2] This case has been followed or cited with approval in many other cases. See, e.g., *Howell* v. *Spatz*, 14 D. & C. 2d 295, 299 (Montg. Co. 1958) (which held that questions concerning insurance coverage were not proper under the Pennsylvania Rules of Civil Procedure), and *Langlois* v. *Allen, supra.* But see *Rosenberger* v. *Vallejo*, 30 F. R. D. 352, 353 (W. D. Pa. 1962), wherein Judge Gourley stated that in his opinion there should be no generalized rule concerning inquiries as to insurance coverage but that each case should be governed by its own merits.

which might be dismissed by the court if the amount in controversy does not amount to $10,000.[3] Therefore, plaintiff is entitled to know the limits of the policy in order that it might meet its burden of proving to the satisfaction of the court that jurisdiction is proper.[4] Its interrogatory should, therefore, be answered to the extent stated in the foregoing Order.

The *McClure* case, supra, controls the ruling as to Document No. 31.

[fol. 53]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND ORDER SUR MOTION FOR SEVERANCE—October 23, 1962

VAN DUSEN, J.

This action for a declaratory judgment under 28 U. S. C. A. §2201 to have determined the coverage of an insurance policy issued by defendant, Lumbermens Mutual Casualty Company, to one Edward Dutcher, is one of several actions which has been brought as a result of an automobile accident which occurred on January 17, 1958.

The accident, which involved the vehicle insured under the policy in question and a vehicle owned and operated by one Thomas W. Smith, resulted in the death of Smith as well as the death of two persons (John Lynch and Donald Cionci) who were in the Dutcher car at the time. The only survivor to the accident is one J. Harris, who was a passenger in the Dutcher vehicle. Dutcher was not in his automobile at the time of the accident. There is a question as

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[3] See *Allstate Insurance Company* v. *Dillard*, 190 F. Supp. 111, 112 (E. D. Pa. 1960) (decision of Senior Judge Grim).

[4] See *Berkowitz* v. *Philadelphia Chewing Gum Corporation*, 303 F. 2d 585 (3rd Cir. 1962), making clear that the trial court has a duty to inquire into questions of jurisdiction, even though not raised by the parties.

to who was driving the Dutcher vehicle, as well as whether it was being driven with permission of the owner.[1]

Provident, the administrator of the Lynch estate, brought an action in this court against the Cionci estate, which action is still pending. See Civil Action No. 25149.[2] Actions [fol. 54] were also commenced in the state courts by the Smith estate and Harris against Dutcher, the Lynch estate, and the Cionci estate.[3]

The present action was originally brought by Provident (which was the only plaintiff) to have determined the coverage of the Dutcher policy as to itself, the liability of Lumbermens for injuries to the decedent Lynch, and the coverage of the policy as to decedent Cionci and his estate. It is Lumbermens' position that Lynch was driving and it demands proof that Cionci was the driver. If it is found that Cionci was driving, Lumbermens claims that he was driving without permission. In any event, Lumbermens denies liability to Provident for any settlement which was made between Provident and the Cionci estate in Civil Action No. 25149.[4]

Lumbermens moved for leave to join Harris and the Smith estate as parties plaintiff, which motion was uncontested.

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[1] The policy in question does not cover accidents which occur when the vehicle is being driven without permission of the owner thereof. See §(a)(2) of sample policy (p. 2), attached to Document No. 37.

[2] There was no appearance for defendant in Civil Action No. 25149. A default judgment was entered and the matter scheduled to be tried on damages alone. The administrator of the Cionci estate thereafter signed a settlement note in the amount of $50,000. The note was signed over 18 months after the present action was commenced and a motion for approval of settlement is now pending before this court. Argument on this motion will be held before the undersigned on November 13, 1962.

[3] Copies of the Complaints in the state court actions are attached to Document No. 37. Both plaintiffs in the state actions claim that Cionci was driving at the time of the accident, under the control of Lynch and on the business of Dutcher.

[4] See footnote 2.

Leave was granted by order of this court dated November 29, 1960 (Document No. 15). Thereafter, on January 24, 1962, an order was entered directing the joinder of Harris and the Smith estate (Document No. 21) and, subsequently, another order amending the caption so as to indicate that they were parties was also filed (Document No. 24). Plaintiff Provident then filed a motion for severance of plaintiffs Harris and the Smith estate for the purposes of trial (Document No. 26), which motion is now before the court.

Provident's position is that it would be prejudicial to allow all the cases to be tried together, since evidence "pos- [fol. 55] sibly admissible" as to plaintiffs Harris and Smith estate will hurt its case. It is Provident's opinion that Dutcher, whom Lumbermens intends to call to show that the vehicle was not being driven with his permission and within the terms of the bailment, would not be a competent witness as against it, the representative of the Lynch estate, if it were the only plaintiff,[5] because of the so-called Pennsylvania Dead Man's Statute,[6] but might be competent against one or both of the additional plaintiffs. Provident believes that if Dutcher is competent against one or both of the other plaintiffs, his testimony would be admissible against it under the decision in *Thomas* v. *Roland;* 167 F. Supp. 622, 624-5 (E. D. Pa. 1958).[7]

Lumbermens takes the position that the cases should not be severed at this late stage in the proceedings, especially when the reason for moving to have them made parties plaintiff was that the issue could be decided in one action

[5] The bailment to which Dutcher would testify was oral and took place with only three people present, Lynch (deceased), Cionci (deceased), and Dutcher.

[6] 28 P. S. 322 et seq.

[7] In the *Thomas* case, it was stated at pp. 624-5 that certain witnesses who were competent to testify in certain of the cases which had been consolidated for trial (i.e., those cases in which they were not parties) appear to have been competent in all the cases. See, also, *Dennick* v. *Scheiwer,* 381 Pa. 200 (1955), which was cited in the *Thomas* case.

without inconsistent results, and also opposes the motion on the ground that Mr. Dutcher is a competent witness against all the parties, whether or not the cases are severed for trial.[8]

[fol. 56] The applicable statute reads in part, as follows:

> "Nor, where any party to a thing or contract in action is dead, or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy, unless the proceeding is by or against the surviving or remaining partners, joint promisors or joint promisees, of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors or joint promisees and the other party on the record, or between such surviving or remaining partners, promisors or promisees and the person having an interest adverse to them, in which case any person may testify to such matters; . . . " 28 P. S. §322.

Competency of a witness is the rule and incompetency the exception, *Hendrickson Estate*, 388 Pa. 39, 44 (1957), it being the burden of the person alleging the incompetency

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[8] Provident has admitted that it intends to prove its case by having Harris testify that Cionci was driving and then relying on the presumption in Pennsylvania law that a vehicle is being driven with the permission of the owner of the vehicle. *Exner* v. *Safeco Ins. Co. of America*, 402 Pa. 473, 477 (1961). Once the presumption arises, the defendant must produce credible evidence negating agency or the issue must be decided in favor of plaintiff. If such evidence is produced, the presumption disappears. *Waters* v. *New Amsterdam Cas. Co.*, 393 Pa. 247, 250-3 (1958).

to show such incompetency. *Hart, Schaffner and Marx* v. *Koch*, 107 Pa. Super. 528, 534 (1933). It would be difficult [fol. 57] for Provident to meet this burden imposed on it under the facts in this case, even if it were the only plaintiff of record.

In order for a witness to be incompetent under the dead man's statute, he must be in one of two classes: a surviving party to a transaction or any other person whose interest is adverse to the decedent. Three conditions must exist: decedent must have had a right or interest in the matter at issue; the interest of the witness (not merely the testimony) must be adverse; and the right of decedent must have passed to a party of record who represents the deceased's interest. *Hendrickson Estate*, supra.

Dutcher does not appear to have the adverse interest requisite before disqualification occurs. The true test of the interest of a witness is that he will either gain or lose as a direct, legal operation and effect of the judgment or that the record will be legal evidence for or against him in some other action. *Com. Trust Co.* v. *Szabo*, 391 Pa. 272, 281 (1957). The adverse interest upon which disqualification depends must be the immediate result of the particular suit and not in its effect or consequences; remote considerations, such as a possible right of indemnity or contribution under which a witness might have an adverse interest, are not to be considered if his interest is not adverse so far as the suit in which his testimony is given is concerned.[9]

Mr. Dutcher will not gain or lose as a direct result of a judgment in this case. He is not a party to this suit, nor could he be made a defendant in the action.[10] The issue [fol. 58] which will be determined in this case, i.e., whether

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[9] *Evans* v. *Eaton*, 20 U. S. 356, 425 (1822); *Billow* v. *Billow*, 360 Pa. 343, 347 (1948); *Gaston Estate*, 361 Pa. 105, 109 (1949); *Braine* v. *Spaulding*, 52 Pa. 247, 248-9 (1866); *Wolf* v. *Carothers*, 3 S. & R. 240 (1817).

[10] Dutcher is a Pennsylvania citizen, as are all of the plaintiffs in this action. See *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 671-2 (1950).

Cionci and his estate or Lynch and his estate are covered by the policy, is not one which actually affects him. The insurance company has obligated itself to defend Dutcher in the pending suits against him and to pay any obligation he incurs in those suits up to the policy limit (see affidavit of L. C. Pirrung, Jr., which is attached to Document No. 37). Therefore, a determination as to whether the insurance company is also obligated to the Cionci estate or others is not adverse to his position. The possibility of a suit by Dutcher against the bailee of the vehicle is not a sufficient interest to be termed "adverse interest" for the purposes of the act under the cases cited above. The fact that a judgment in excess of the policy provisions might be rendered against Dutcher in the state court actions, thus making him personally liable to one or more of the plaintiffs in the actions, does not make his interest here adverse, since in the state court actions it is alleged that the vehicle owned by him was being driven by Cionci, under Lynch's control, and that Lynch was at that time acting as Dutcher's agent. The issue of agency is not raised here, but only the question of what permission was given.[11]

[fol. 59] It is doubtful that a trial judge would find that Dutcher was an incompetent witness because the record in this case could be used for or against him in the state court actions. Dutcher is not a party to this action, nor could he be made one; Lumbermens' defense is not controlled by him

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[11] Note *Ohio Casualty Ins. Co.* v. *Maloney*, 44 F. Supp. 312, 314 (E. D. Pa. 1942), in which the court, in holding that the insured was not obligated to be joined with those claiming under the policy in a declaratory judgment action brought by the insurance company, stated that no rights between the insured and the company were at issue in the suit and that any rights between them will be unaffected by the judgment rendered. The court said:

> "The controversy being, as alleged in the complaint, only as to whether or not Joseph W. Maloney as operator of one of the trucks of (the insured), which was insured by the plaintiff, is covered and protected by the terms of the insurance policy, the judgment rendered in this case will settle that question and no other."

and different issues apply. It seems unlikely that the record in this case could be used against him, as he was not a party of record here. He would not be permitted to use it in his favor on the same grounds. Counsel for Provident argued during the argument on the instant motion that the record might be used for or against one of his co-defendants in those actions (or for or against one or both of the plaintiffs). This is not likely, as the position of the parties is different and, in any event, the possibility that the record can be used for or against one of such co-defendants does not, under Pennsylvania law, make a party "adverse". As the principles of res judicata or collateral estoppel apparently would not be considered applicable by the Pennsylvania state court, there is no reason to term Mr. Dutcher an "adverse party" because this record might be used in those cases.[12]

For the reasons stated above, as well as other reasons which might become important during the trial of this case and the trials in the state courts,[13] it seems unlikely that

[12] It is noted that neither Harris nor the Smith estate represents the interest of a decedent about whom testimony would be given by Dutcher so they could not object to his testimony in the state court cases.

[13] Because it has been unnecessary to do so, the undersigned has not gone into certain other possibilities that might arise at the trials which might make a ruling on the position taken by Provident unnecessary, such as: (1) Harris might be declared incompetent to testify on the basis of an objection from the administrator of the Cionci estate; (2) the objections from co-defendants in the state court actions might prevent Dutcher's testimony there; (3) the Federal trial judge might rule that once Harris has testified, 28 P. S. 325 becomes applicable and makes Dutcher competent, even though he might disagree with our opinion that Dutcher is generally without the terms of 28 P. S. 322; or (4) the Federal trial judge might decide to exercise his discretion and not exercise jurisdiction in certain of these cases because of the pending state court actions. See *e.g.*, *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 495 (1942); *State Farm Mutual Automobile Ins. Co.* v. *Bonwell*, 248 F. 2d 862, 867-8 (8th Cir. 1957); *State Farm Mutual Automobile Insurance* v. *Moore*, 177 F. Supp. 520, 522 (D. Ore. 1959).

[fol. 60] the trial judge will rule the testimony of Mr. Dutcher inadmissible, whether or not the severance is granted. This court will, therefore, not grant the requested severance at this late stage of these proceedings on the remote possibility that the joint trial will harm plaintiff Provident. It has been held by the United States Court of Appeals for the Third Circuit that in a declaratory judgment proceeding based on the extent of the insurer's responsibility under an automobile liability policy, persons injured in the accident in question are necessary and proper parties. *Maryland Casualty Co.* v. *Consumers Finance Service,* 101 F. 2d 514 (3rd Cir. 1938). There seems no reason to act contra to the rationale of that holding and sever the actions of an injured party and of the representative of a deceased party in this action on this record. It is particularly significant that the reasons urged here could have been raised prior to the order of January 24, 1962, directing that Harris and the Smith estate be joined as parties plaintiff (Document No. 21), and it is doubtful if any judge of this court other than Judge Wood, could grant the relief sought here. See *Two Guys from Harrison-Allentown, Inc.* v. *McGinley,* 266 F. 2d 427, 432 (3rd Cir. 1959); *United States* v. *Wheeler,* 256 F. 2d 745, 746-8 (3rd Cir. 1958), cert. den. 358 U. S. 873 (1958); *TCF Film Cor-*
[fol. 61] *poration* v. *Gourley,* 240 F. 2d 711, 713 (3rd Cir. 1957).

It will be up to the trial judge to rule on the applicability of the Dead Man's Act at the trial. The order below, denying the motion, is based on the rejection of the reasons stated in the motion and, since the record might justify such a motion at some later date, the order is being entered without prejudice.

ORDER

And Now, October 23, 1962, after consideration of the foregoing motion, the attached briefs of counsel, oral argument and the record, It Is Ordered that the Motion of

Plaintiff Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, a/k/a John Roberts Lynch, Deceased, for Severances of Plaintiffs, John Landis Harris and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased, for Purposes of Trial (Document No. 26) is Denied, without prejudice.

Francis L. Van Dusen, J.

IN UNITED STATES DISTRICT COURT

ORDER AMENDING MEMORANDUM OPINION—October 29, 1962

And Now, October 29, 1962, It Is Ordered that the Memorandum Opinion filed October 23, 1962, in the above matter is Changed as follows:

[fol. 62] A. In line 7, on page 3, the word "approving" is substituted for the word "directing".

B. The second full sentence beginning on page 9 is changed to read as follows:

> "It is particularly significant that the reasons urged here could have been raised prior to the Orders of November 29, 1960, and January 24, 1962, contemplating that Harris and the Smith Estate be joined as parties plaintiff (see Documents Nos. 15 and 21), and it is doubtful if any judge of this court other than Judge Welsh or Judge Wood could grant the relief sought here."

Francis L. Van Dusen, J.

IN UNITED STATES DISTRICT COURT

MOTION FOR REHEARING AND RECONSIDERATION
—Filed November 2, 1962

1. On October 23, 1962, this Court filed a Memorandum Opinion and Order Sur Plaintiff's Motion for Severance for Purposes of Trial, modified by Order dated October 29, 1962.

2. The reason for plaintiff's Motion was that a combined trial of all the plaintiffs would be prejudicial to the plaintiff in that witnesses otherwise incompetent to testify under the so-called Pennsylvania Dead Man's Statute, 28 P. S. 322 may be competent as to other plaintiffs in a combined trial.

3. The Court in its Opinion grounds its decision, inter alia, upon the fact that this Motion is filed at a late stage [fol. 63] of the proceedings on the remote possibility that the joint trial would harm the plaintiff herein. It is respectfully submitted that the Motion for Severance for Trial was first made at the pre-trial of the within cause which is the earliest stage available to a party. The Court has confused joinder of parties with severance of causes for purposes of trial. Severance for trial raises issues separate from the issue of joinder of proper parties to the action. The Order of Judge Wood referred to on page 9 of the Opinion relates only to permission to the defendant, Lumbermens' Mutual Casualty Company, to amend pleadings to clarify inconsistent averments which had been made heretofore. The order of Judge Welsh referred to in the Order of October 29, 1962 was a motion to join parties deemed indispensable to the proceedings and could not be properly objected to by the plaintiff. Plaintiff's failure to object to defendant, Lumbermen's Mutual Casualty Company's Motion to Amend Pleadings or the joinder of indispensable parties did not constitute a waiver of its right to ask for a severance for trial.

4. From November 29, 1960 to the time of the pre-trial, despite permission granted by the Court, service was not made upon the additional parties joined as party plaintiffs nor was the caption duly amended. Therefore, at the time of the pre-trial, the added party plaintiffs were not before the bar of the Court and no Motion for Severance for Trial was required or necessary.

5. The Court erred in its Opinion that there was no adverse interest between Dutcher and the Estate of Lynch. The Court has applied *Billow* v. *Billow,* 360 Pa. 343, 347 (1948), though it has been inferentially overruled by *Commonwealth Trust Company, Administrator* v. *Szabo,* 391 [fol. 64] Pa. 272 (1957). In this regard Dutcher has a direct adverse interest to the Estate of Lynch by reason of the bailment of the automobile to Lynch and the failure to return the bailed property intact. The Court also did not give proper weight to the adverse interest between the Estate of Lynch and Dutcher as co-defendants and the right of indemnity by Dutcher as in that action it should be found, as alleged, that the control of the automobile was in Lynch and Lynch was an agent of Dutcher. Again, see *Commonwealth Trust Company, Administrator* v. *Szabo,* cited supra.

6. The Court has ignored *Lyons* v. *Bodek Estate,* 393 Pa. 131, 142 A. 2d 199 (1958), by permitting the shield of the insurance coverage[1] to obscure the clear and persisting adverse interest of Dutcher. The Court has held that the so-called Dead Man's Rule is restricted to a party which is contrary to the clear wording of the act.

7. The Court applied the wrong test on page 6 of its opinion when it framed the issue as being the question of whether Cionci or his estate are covered by the policy. It is submitted on the contrary in accordance with the lan-

[1] or lack of insurance coverage, the policy limits of Dutcher never having been revealed.

guage of the so-called Dead Man's Statute that the issue is whether he would gain or lose as the direct legal operation and effect of the judgment, *or that the record will be legal evidence for or against him in some other action. Commonwealth Trust Co.* v. *Szabo,* cited supra. The testimony of Dutcher as to the terms of the permissive use of the automobile would be binding upon Dutcher both in the actions in Delaware County where he is charged with being a co-[fol. 65] tortfeasor and indemnitee of the plaintiff herein and would be binding in any action brought by him against the plaintiff on a bailment. The holding in *Billow* v. *Billow,* cited supra, relied on by the Court is dictum.

8. If the Court feels as the Pre-trial Judge that it is not the proper Court to whom a motion for severance for purposes of trial should be addressed, it is respectfully submitted that the Court should not furnish an advisory opinion but should withdraw its opinion and modify its order so that a subsequent tribunal may not feel constrained to follow such advisory opinion.

For the reasons set forth hereinabove, it is respectfully requested that this Court grant the plaintiffs a rehearing and reargument of this issue.

Respectfully submitted,

J. Willison Smith, Jr., Bayard M. Graf, Freedman, Landy and Lorry, By Avram G. Adler, Attorneys for Plaintiff.

[fol. 66]

ORDER SUR MOTION FOR REHEARING AND RECONSIDERATION (DOCUMENT NO. 40)—NOVEMBER 9, 1962

And Now, November 9, 1962, after consideration of the above Motion and the record, It Is Ordered that the Motion for Rehearing and Reconsideration (Document No. 40) is Denied.

Francis L. Van Dusen, J.

There is nothing in F. R. Civ. P. 42(b) that limits the time when a separate trial may be requested. In view of the entry of the order of November 15, 1960 (Document No. 15), it could easily, and most appropriately, have been requested by a motion for such severance, if the additional parties plaintiff were joined, at the time the above order was submitted to the court in 1960 or when the plaintiff's Pre-Trial Memorandum (Document No. 19) was filed in January 1962, or as part of that Memorandum, rather than first sought at the pre-trial conference in September 1962. There is no waiver by failure to request a severance until the eve of trial (this case will be No. 5 in the Pool as soon as defendant's counsel completes the case which he is now trying), but it is a circumstance the court may consider.

This Motion misstates the reasoning of the Memorandum Opinion in so many respects[1] that it is not feasible or neces- [fol. 67] sary to discuss them. Since the parties elected to present this application to the pre-trial judge, they are in no position to object to his stating his reasons in ruling on it. *Lyons* v. *Bodek Estate*, 393 Pa. 131 (1958), is distinguishable on its facts from the issue presented by this record and will be considered by the trial judge in the light of the record before him. The Memorandum Opinion makes clear at page 9 that it will be the responsibility of the trial judge to determine the applicable law on the basis of the record and the evidence at the time of trial.

IN UNITED STATES DISTRICT COURT

REPORT OF SUPPLEMENTAL PRETRIAL CONFERENCE HELD DECEMBER 7, 1962

Case Title: Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, Deceased, and John Landis Harris and Sarah B. Smith,

[1] For example, as to paragraph 7 of the Motion, the test of the *Szabo* case, 391 Pa. 272, 281 (1957), is stated on page 5 and is applied at pages 7-9.

Administratrix of the Estate of Thomas W. Smith, Deceased v. Lumbermens Mutual Casualty Co. and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased.

Civil Action No. 26455.

Counsel Present: P-Provident—Avram G. Adler, Esq. and Bayard M. Graf, Esq.

Ps-Harris and Smith Estate—Herbert C. Nelson, Esq.

D-Lumbermens—Lynn L. Detweiler, Esq.

(R. Stuart Jenkins, Esq., counsel for the Cionci Estate, was excused.)

It was stipulated that:

[fol. 68] (1) The following cases have been instituted in the courts of Delaware County, Pa., arising out of the accident which is the subject matter of this suit:

Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased v. Edward S. Dutcher and Estate of John R. Lynch, Deceased and Estate of Donold Cionci, Deceased, Common Pleas Court, Delaware County, Dec. Term 1959, No. 1047; and

John Landis Harris v. Edward S. Dutcher and Estate of John R. Lynch, Deceased, and Estate of Donald Cionci, Deceased, Common Pleas Court, Delaware County, Dec. Term 1959, No. 1048.

(2) A map of Eastern Delaware County, copyrighted and published by Franklin Survey Company, as described in defendant Lumbermens' Motion for Leave to Amend Pre-Trial Memorandum (Document No. 43), may be offered into evidence by it, but defendant Lumbermens has agreed to try to secure a copy of such map without certain red lines on it if it is available.

In the event that the case is not reached for trial by December 14, 1962, plaintiffs shall be entitled, on or before December 20, 1962, to file supplements, naming witnesses, to

the pretrial memoranda already filed on their behalf. Defendants shall be entitled to discovery in connection with such witnesses on or before January 4, 1963.

Motions for severance made on behalf of all plaintiffs were denied.

See notes of official court reporter.

There is attached to this Report a self-explanatory memorandum of Judge Wood dated December 6, 1962, concerning discussions held when the case was called before him.

Copies of the pretrial memoranda and of the pretrial [fol. 69] report of September 1962 were made available to Mr. Nelson today.

There is also attached hereto copy of letter of the pretrial judge to all counsel dated December 6, 1962.

Francis L. Van Dusen, J.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF TESTIMONY

Philadelphia, Pa., December 13, 1962

Before: Hon. Alfred L. Luongo, J., and a jury (two alternates).

PRESENT:

Freedman, Landy & Lorry by Avram G. Adler, Esq., and Bayard M. Graf, Esq., representing Provident Tradesmens Bank and Trust Company, etc., Plaintiff.

Herbert C. Nelson, Esq., representing John Landis Harris and Sarah B. Smith, etc., Plaintiffs.

Swartz, Campbell & Henry by Lynn L. Detweiler, Esq., representing Lumbermens Mutual Casualty Company, Defendant.

Schroeder, Jenkins & Raymond by R. Stuart Jenkins, Esq., representing George M. Patterson, etc., Defendant.

[fol. 70] The Court: You may swear the jury.

(Jury sworn at 2:45 o'clock p. m.)

The Court: You may proceed, Mr. Adler.

Mr. Adler: * * * (Opened to the jury.)

* * * * * * *

Mr. Detweiler: * * * (Opened to the jury.)

* * * * * * *

Leonard J. McCoy, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Adler:

Q. Officer McCoy, by whom are you employed?

A. The Radnor Township Police.

Q. And how long have you been so employed?

A. Twenty-six years.

Q. And—and you have been subpoenaed to be here today?

A. Yes. I have.

Q. And the records relating to an accident—

A. They were also subpoenaed. I have them here in my possession.

[fol. 71] Q. That is the accident in which Cionci and Lynch and the Dutcher automobile were involved?

A. That is correct.

Q. Now, are these records kept in the ordinary course of the business of the Radnor Township Police?

A. They are. Yes, sir.

Q. And these records have been placed in your custody to bring here today?

A. That is right.

Mr. Adler: Your Honor, may I have the file involving the Cionci accident marked for identification as Plaintiffs' Exhibit 1?

The Court: Yes.

Mr. Adler: And if we—if any component parts are marked thereby I will request the Court's permission to designate them by letter.

The Court: All right.

(Radnor Township Police file was marked Exhibit P-1 for identification.)

Mr. Adler: Your Honor, in order to put the evidence in a—in a perhaps better chronological sense, may I have permission to withdraw Officer McCoy from the stand so that Mr. Wineburner, who was a former member of the police force, can testify as to the accident with the use of these records?

. . . . . .

[fol. 72] JOSEPH N. WINEBURNER, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Adler:

Q. Mr. Wineburner, I can't call you "Officer Wineburner" any more; is that right?

A. That is correct.

Q. When did you leave the Radnor Township Police Force?

A. In 1961, September of 1961.

Q. And prior to that time how long had you been on the Radnor Township Police Force?

A. Eight years.

Q. Now, Officer Wineburner, were you on duty at the time of this accident in which the Cionci car was involved?

A. Yes, sir. I was.

Q. And what—would you tell His Honor and the jury how you first heard of the accident, giving the time and place and what you then did after that.

A. Well, on the evening of January 17, 1958, I would—was working the four to midnight shift—we had been on duty since 4 o'clock—and we got a radio call to—that there was an accident. This call was made to the car that was in the—in another section of the Township, the one that Officer McCoy was working.

When he—he was out on a—some job that he had, and I took the call, was sent down to this—to the scene of the accident on Bryn Mawr Avenue.

Q. Well, where was the scene of the accident, Officer—Mr. Wineburner?

[fol. 73] A. It was on Bryn Mawr Avenue about, oh, say roughly about a half mile from Haverford Road, just about 300 yards—300 feet above Castlefinn Lane.

Q. And what did you see when you arrived?

A. Well, when I arrived on the scene of the accident I saw one car sitting in the middle of the road tore up, a truck laying on the side of the road, laying on its side, and there were several spectators milling around, and the first thing was to go and check the cars to see if there were anyone injured and as to what extent and to what I could do to help them, how much help I was going to need to—these people out of the cars and into the hospital so they can get their proper medical care.

Q. What did you observe when you got to the car that you saw in the middle of the road?

A. When I arrived there I arrived—came up on the—would be the left side of the car, the driver's side; was a man standing there holding a man up to keep him from falling on the road. This man was pinned in the wreckage of the car. There was a man—

Mr. Detweiler: I didn't understand that. Didn't you say somebody was holding somebody else up?

The Witness: Yes, sir. One of the spectators was holding a man.

Mr. Adler: Your Honor, this is not the—Mr. Detweiler will have a full opportunity on cross-examination. I don't think this is the point—

The Court: I think it is all right to get it clarified. I think I understood one thing, and perhaps it is not correct. [fol. 74] Did you mean, Officer, from what you said, that there was someone pinned in the wreckage of the car and that someone on the outside of the car was supporting his body to keep it from falling onto the road?

The Witness: He was supporting the upper portion of the—his body, Your Honor, to keep him from falling out onto the road.

The Court: All right. Fine. That is what I thought you meant.

By Mr. Adler:

Q. And that was on what side of the car?

A. On the left side or the driver's side of the car.

Q. And what about on the other side of the car?

A. There was a man was hanging out of the car. He was supported partially by the door, of what was left of the door of the car.

Q. You said the man in the driver's side was pinned in the wreckage. What was pinning him in the wreckage?

A. Steering wheel, steering column, firewall, pedals.

Q. Now, Mr. Wineburner, did you know who that person was that was pinned on the driver's side of the car?

A. No, sir. I did not.

Q. Did you know who the man was that was on the other side of the car, the non-driver's side of the car?

A. No, sir. I did not.

Q. You didn't know either one of those persons?

A. No, sir.

Q. Did you subsequently find out who they were?

A. Yes, sir, I did. When Officer McCoy arrived on the [fol. 75] scene, he knew both men. This was the area that he had worked in for a number of years and knew both of them.

Q. How soon did Mr.—did Officer McCoy arrive on the scene?

A. No more than five minutes later after I arrived there.

Q. And they were still in the wreckage when he arrived?

A. Yes, sir.

Q. Now, who was the man that was pinned behind the wheel of the car?

Mr. Detweiler: I object to that, sir. He said he didn't know who he was. He evidently learned by hearsay later.

Mr. Adler: Your Honor, I contend that this is not hearsay. Officer McCoy is here and, of course, is available to testify.

The Court: I will overrule the objection.

By Mr. Adler:

Q. Who was the man that was behind the wheel?

A. I learned from Officer McCoy that it was Donald Cionci.

Q. And who was the man that was on the other side of the car, not—the—the non-driver's side of the car?

A. Mr. Lynch.

Q. Was there any other persons that you subsequently found had been in the automobile?

A. Mr. Harris.

Q. Where was he at the time you came on the scene?

A. Mr. Harris was down at the truck which was a few feet [fol. 76] away. I don't know exactly how many they were. He was laying on the side of the road on the embankment where he had been, I imagine, helped by people from the—

Q. Well, don't tell us what—

A. All right.

Q. Just tell us what you saw.

A. He was on the side of the road next to the truck.

The Court: And what was his name again?
The Witness: Mr. Harris.
The Court: Harris?
The Witness: Yes, sir.

By Mr. Adler:

Q. And is Mr. Harris in the courtroom?
A. Yes, sir. He is.
Q. Would you point him out, sir?
A. Mr. Harris is the gentleman in the first row sitting on the aisle.

Mr. Adler: Would you stand up, please.

(Gentleman rises.)

By Mr. Adler:

Q. Is this Mr. Harris?
A. Yes, sir.

Mr. Adler: Thank you.

[fol. 77] By Mr. Adler:

Q. Now, what about the other vehicle?
A. The other vehicle was laying on its side, on its right side and off to the side of the road, and the occupant, the driver of the vehicle, was still inside the cab of the truck. It was a Chevy truck, as I recall, '55 model.
Q. And was he subsequently identified?
A. Yes, sir. He was—he told me what his name was, that his name was Smith, and I got his name and address from him at the time. He was conscious.
Q. Now, were—was Cionci alive or dead at the time you got to the scene of the accident?
A. He was alive.
Q. What about Lynch?
A. He was alive.
Q. What was Cionci's injuries so far as you could observe?

Mr. Detweiler: Objected to.

The Witness: As far as I could observe—

Mr. Detweiler: I object to that, Your Honor. I don't think that is material in this issue.

The Court: Is there going to be any materiality to this?

Mr. Adler: Yes, Your Honor, because there is going to be a question as to what Cionci might have said or could have said, and—

The Court: All right. I will overrule the objection, pro-
[fol. 78] viding that he keeps to what he himself observed, not conclusions from that.

By Mr. Adler:

Q. Just tell us what you were able to observe.

A. I noticed that he was bleeding, bleeding quite a bit, and that he was cut and that his jaw—

Mr. Detweiler: Your Honor, I think the only thing material is whether he could talk and did talk. That is all.

The Court: Well, I think he can describe what he saw. The jury will have to draw the conclusions from that, if they become germane or pertinent. I don't know yet where it is leading.

Proceed.

The Witness: He was bleeding from the—his face, and he had a bad cut on his jaw bone was—it looked to me as if it were broken. It was protruding from the laceration down onto his throat. Facial cuts is what I observed, severe.

By Mr. Adler:

Q. Was—can you tell us whether or not he was in a condition that you could interrogate him?

A. Not there. I mean, he wasn't in any—he was in a state of shock, it appeared.

Q. Now, what about Lynch?

A. Mr. Lynch was unconscious.

Q. Now, Mr. Wineburner, can you tell us from those [fol. 79] records of the police department when—whether or not Cionci subsequently survived this accident or died?

A. Well, the hospital reports and the injury section state that he died.

Q. When?

A. The following afternoon.

Q. And what about—

The Court: Before we get to that, Mr. Adler, I don't recall his having told us the time—

Mr. Adler: I am sorry.

The Court: —of his arrival on this scene.

By Mr. Adler:

Q. When did you arrive on the scene, Mr. Wineburner?

A. About a quarter of five, about—well, say I got the call around quarter of five and probably took about five minutes to get there from where I was, maybe a little bit longer, but I arrived on the scene before 5 p. m.

Q. Can you tell us whether or not Lynch survived this accident?

A. No, sir. Mr Lynch died.

Q. Can you tell us whether or not Mr. Smith survived this accident?

A. Mr. Smith died.

Q. When did Mr. Lynch die?

A. Mr. Lynch died in February, February 3, 1958.

Q. When did Mr. Smith die?

A. On January 27, 1958.

Mr. Adler: You may cross-examine.

[fol. 80] Cross examination.

By Mr. Detweiler:

Q. Officer, was the car standing upright when you got there, the car that the two men were in?

A. The car was on its wheels; yes, sir.

Q. On all four wheels; and did McCoy come up while you were still observing the man bleeding—or, rather, supported on the outside of the driver's side? Is that when Mr. McCoy came up?

A. Well, he came up in that time. I had checked all four people that were involved in the accident for injuries, and at—that is when Mr. McCoy, Officer McCoy arrived. I think at that time I was already calling for ambulances.

Q. Well, I understand you pointed out the man who had—

A. And he came over to the car and asked me what he could do, and I told him that he could—

Q. You pointed out—I hadn't finished—you pointed out the man who had been leaning down at the left side and was supported by some pedestrian and asked him who that man was; is that right?

A. Shortly after he arrived, but not right at the minute.

Q. All right. Now, the place where the accident happened was on Bryn Mawr Avenue, was it not?

A. Yes, sir.

Q. Close to the intersection of Castlefinn Lane; is that right?

A. That is right.

Q. And that is about a half mile from Haverford Avenue?

A. In rough figures; yes, sir.

Q. And then it is about another half mile beyond Haver-
[fol. 81] ford Avenue and Lancaster Pike, isn't it, or Lancaster Avenue?

A. I would say so; yes, sir.

Q. And that would not be the way to get from Bryn Mawr to Ardmore, would it?

A. Well, you—you don't have to go out all the way to Lancaster Avenue; you can—you could turn right on Railroad Avenue and go right into Ardmore.

Q. As you go on Lancaster Avenue in Bryn Mawr and you get to Ardmore, you—you go southeast on Lancaster Avenue, don't you?

A. You would; yes.

Mr. Detweiler: That is all.

Redirect examination.

By Mr. Adler:

Q. Where is this Railroad Avenue, Officer?

A. Right at the hospital, sir.

Q. Pardon me?

A. Just—it would be on the north side of Haverford Road, a little road that angles off.

* * * * * * *

[fol. 82] LEONARD J. McCOY, resumed.

Direct examination (continued).

By Mr. Adler:

Q. Officer, you have already been sworn.

Would you tell us what you saw when you arrived at the scene of this accident.

A. I arrived at this accident at approximately 4:50 p. m., and I spoke to Joe Wineburner, and he asked me to come up and look at the occupants of the car. He asked me if I knew them, and I identified both Cionci and Lynch.

Q. By what means did you identify them, Officer?

A. Well, I knew them. I knew both of them for years.

Q. And who was the man that was pinned behind the wheel?

A. Cionci was in back of the wheel.

Q. And the man on the non-driver's side?

A. Lynch.

Q. Were photographs subsequently taken of this automobile?

A. We did take them at the time of the accident, but unfortunately they didn't turn out, so we took one the next day, and I have it here.

Q. And that is in the official records of the police department?

A. Yes. This was taken in the—at headquarters the following day.

Mr. Adler: Your Honor, I ask that this be marked as Plaintiffs' Exhibit 1-A.

[fol. 83] We—we have already included it as 1-A. Your Honor gave me permission to designate the components of 1 with a letter.

(Photograph was marked Exhibit P-1A for identification.)

By Mr. Adler:

Q. May I see the remaining?
A. Yes. Sure.

Mr. Adler: You may cross-examine.

Cross examination.

By Mr. Detweiler:

Q. Officer, how long have you been on the—Haverford Township Police Force, is it?
A. I never worked there. Radnor Township.
Q. Radnor?
A. That is right.
Q. How long were you on that force?
A. Twenty-six years.
Q. And how long had you known Lynch and Cionci?
A. Oh, roughly twenty years.
Q. During that time they lived where?
A. They lived in Bryn Mawr.
Q. All that time?
A. Well, yes. I know them from the—about the time Cionci was, say, about fourteen years old.
Q. As long as you knew them they both lived in Bryn Mawr?

[fol. 84] A. Well, Lynch I didn't know that long. but Cionci—Cionci I knew about twenty years.

Q. I say; as long as you did know them they lived in Bryn Mawr?

A. I am not sure about Lynch, but he used to—he used to go around with Cionci.

Q. Right; you saw him around Bryn Mawr—

A. Oh, yes.

Q. —frequently?

A. Oh, yes, many times.

Q. How far is it from Bryn Mawr to Ardmore down the Lancaster Pike?

A. Three miles.

Q. About a mile, isn't it?

A. It is a long, long mile.

Q. Long mile?

A. Yes, sir.

Q. How far is Media?

A. Approximately eleven.

Q. It is eleven miles; Media is southwest and—of Bryn Mawr, and Ardmore is southeast, isn't it?

A. It would be east; yes, sir.

Q. East?

A. East; yes, sir.

• • • • • • • •

[fol. 85] LEONARD J. McCOY, recalled.

Direct examination.

By Mr. Adler:

Q. Officer, how—how long have you been on the police force?

A. Twenty-six years.

Q. And how many automobile accidents have you investigated?

A. Oh, that is a rough one.

Q. Well, can you tell us approximately how many a year?

A. Oh, I would say approximately a hundred.

Q. And based upon the experience in investigating these accidents, Officer, do you have an opinion as to who was driving the vehicle at the time of the accident?

A. Well, I—

Mr. Detweiler: I object to that, Your Honor.

I am willing to concede that Cionci was driving from what I have heard here today.

I don't think that is the way to prove it.

* * * * * * *

ADMISSIONS

Mr. Adler: Your Honor, I would like at this time to read certain admissions into evidence.

Your Honor, in plaintiff's requests for admissions under Rule 36 of 1c—

[fol. 86] The Court: Excuse me just a moment, Mr. Adler.

Members of the jury, when I grant permission to counsel to read into the record admissions, you are to consider that the same as if there had been testimony presented from the witness stand, so you will pay careful attention to whatever is read.

* * * * * * *

Mr. Adler: * * *

May it please the Court, it was requested that the defendant, Lumbermens Mutual Casualty Company, admit the following averment:

"The automobile being operated at the time of the accident by Donald Cionci was owned by Edward S. Dutcher."

The answer to that was:

"Admitted as to ownership. Defendant is without knowledge sufficient to admit or deny the averment that the automobile was being operated by Donald Cionci."

That has now been conceded by the defendant, Your Honor.

The request for admission 1g:

"Defendant, Lumbermans Mutual Casualty Company issued a Family Automobile Policy to Edward S. Dutcher accompanied by a Declarations Page Form AA130 properly executed, a true and correct copy of which was furnished to counsel for plaintiff by letter," and I have this policy, and that is admitted.

I wish to read, Your Honor, request for admission 1f:

"The only living witness known to defendant, Lumbermens Mutual Casualty Company, or its attorneys, with any knowledge whatsoever concerning the conversation in which Edward S. Dutcher granted permission, limited or other-[fol. 87] wise, for the use of his automobile on the date of the accident is Edward S. Dutcher."

And that is admitted.

Your Honor, 1d and 1e, which is that the John R. Lynch and Donald Cionci are deceased, are admitted.

Your Honor, the requests for admissions which I have just read as to Lumbermens Mutual Casualty Company have also been admitted by George M. Patterson, administrator of the estate of Donald Cionci, deceased.

May we see Your Honor briefly at side bar in regard to the one thing that Mr. Detweiler mentioned in my opening speech?

The Court: All right.

DISCUSSION

Mr. Detweiler: Your Honor, could I put on some witnesses and get through with the day? And then we can take that matter up afterwards?

The Court: Fine.

Mr. Detweiler: We could use the time.

Mr. Adler: It is part of the plaintiffs' case, Your Honor, but if Your Honor will consider it as—

The Court: What is part of your case? I thought you said that it was going to come up in his case.

Mr. Adler: No. This is—this is the matter which I started in my opening speech and Your Honor asked me to reserve it until Your Honor made a ruling.

[fol. 88] The Court: Oh, come up a moment.

(At side bar:)

The Court: I realize now what he is referring to. He started to comment about having obtained a judgment.

Mr. Detweiler: Judgment against the—I don't think it is material to the case at all.

Mr. Adler: I think I am required to prove it, Your Honor.

The Court: Well, now, wait a minute.

Mr. Detweiler: Oh, no.

The Court: As long as we have something on the record here.

Now, what is the situation before he can—

Mr. Detweiler: The situation is this, Your Honor, that in another action in this court—I don't have the civil action in front of me—

The Court: Wait. Before either of you speaks, I want to know who did what here, who, in fact, sued before and got a judgment.

Mr. Detweiler: The estate of Lynch sued the estate of Cionci in trespass for wrongful death.

The Court: O. K.

[fol. 89] Mr. Detweiler: No appearance was entered and a judgment was taken by default.

I am not sure about the appearance, but a judgment was taken by default.

Not long ago a settlement was effected between the attorney representing the Cionci estate and the attorney representing the Lynch estate which was submitted to Judge Van Dusen for approval.

I objected to it on the ground that it was not an honest-to-goodness settlement, that its only purpose was to fasten liability on the Lumbermens Mutual Casualty Company, if they were successful in this declaratory judgment.

Judge Van Dusen, however, held that the Cionci estate was entitled to limit its liability by such a settlement and to prove the settlement.

Now, whether judgment was entered on it or not, I don't know, but I don't think it is material to the issue in this case.

The Court: And what are you prepared to concede for the purposes of this declaratory judgment action?

Mr. Detweiler: You mean concede with respect to the trespass action?

The Court: No—what do you have to concede with respect to as far as the record is concerned? Do you concede—

Mr. Detweiler: Well, I will concede the record shows whatever it shows, Your Honor. I don't quite know what you mean.

[fol. 90] The Court: No, no. I am speaking now of whether if this jury returns a verdict in the declaratory judgment action favorable to the estate of Lynch, will you on the record be bound by what took place?

Mr. Detweiler: Absolutely not.

The Court: You are not prepared to be bound by that?

Mr. Detweiler: No, sir.

The Court: Then we are—

Mr. Detweiler: We are merely deciding a question of coverage. We are not trying the case of the Lynch estate versus the Cionci estate?

Mr. Adler: May I be heard, Your Honor?

The Court: Yes.

Mr. Adler: There are three things that I have to prove: One, the ownership of the car and the issuing of an insurance policy; two, that the person driving the car; and three, that there is a judgment or a suit pending under the policy.

Now, I have a judgment and a settlement under that judgment of the damages, and I am required to prove it, and I think that the jury ought to know, too. I don't think they ought to be left in the abstract.

The Court: Why?

Mr. Adler: Well, they ought to know that there has been [fol. 91] a suit between—because it is going to come up in —in other aspects of the case.

In the cases in Delaware County, Dutcher is a defendant. It is crucial in my case that Dutcher is not a defendant in my case, and they ought to know that.

Mr. Detweiler: That would be highly prejudicial.

Mr. Adler: No; it is not prejudicial, and it ought to be on the record, because it is going to be crucial in Your Honor's determination on whether Dutcher can testify under the Dead Man's Rule.

I have got to have it on the record.

Mr. Detweiler: Oh, I don't mind you putting it on the record, but I don't think the jury ought to hear a word about it.

The Court: State for the record exactly what it is that you propose to prove in the nature of an offer of proof, and then I will rule on it.

Mr. Adler: Would you give me the civil action number so I can—

The Court: Just a moment. How much further can we go if I dispose of this quickly? What do you have?

Mr. Detweiler: Well, I have got one very short witness, and Dutcher who may be on the stand for a half hour, three-quarters of an hour. I don't know how long he will be cross-examined. But I would like to get him on, because he works at night and I am having difficulty getting him down here.

[fol. 92] Mr. Adler: Well, we are going to have a long legal argument before Dutcher testifies.

Mr. Detweiler: No.

Mr. Adler: Because that is a key issue in this case.

May it please the Court, my offer of proof is that in Civil Action No. 25149, in an action brought in this court, Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, deceased, filed a suit against George M. Patterson, Administrator of the Estate of Donald Cionci, deceased, and that thereafter judgment was entered by default and the case was placed on the trial list for the determination of damages.

Thereafter, when the case was on the trial list, the estate of Donald Cionci, deceased, settled their liability and a judgment note was passed from the estate of Donald Cionci, deceased, to the Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, and that the—in a subsequent proceeding in this court the amount of the settlement was approved by the Court as reasonable.

That is my offer of proof.

The Court: Was the assured a party to the proceeding, the "assured" meaning the named assured?

Mr. Detweiler: No.

Mr. Adler: Edward S. Dutcher?

The Court: Yes.

[fol. 93] Mr. Detweiler: No.

Mr. Adler: No. He was not, Your Honor.

The Court: All right.

Mr. Adler: But that is a crucial fact in the—in my case.

The Court: I will sustain the objection to your offer of proof. The record shows now what you wanted to put in.

We will proceed. It being a declaratory judgment action, we have the issue here as to whether there was permission, whether there is coverage.

What flows therefrom will have to be resolved in one way or other. This jury will not resolve it.

Mr. Adler: Do I understand, Your Honor, that it is on the record but merely excluded from the jury's hearing? Because it is crucial.

The Court: No, sir; no. It is on the record, what you proposed to prove, and there has been an objection made to it as not being relevant to the declaratory judgment action that is before this Court and this jury, and I have sustained the objection, but your record now is complete in the sense that you have made your offer of proof for the record in order that the appellate court may know what it is you intended to prove.

I have ruled that in this case, this declaratory judgment proceeding, it is not relevant; it has no bearing.

Mr. Adler: May I make a—an offer, a—before you—to ask Your Honor to reconsider the ruling, explain why, if, [fol. 94] even if Your Honor may deem it important to exclude from the jury, it should be included on the record.

The Court: Well, now, what does that do? What does that prove? You have it on the record in that sense. You have stated all these things which are a matter of record in this thing.

Mr. Adler: But I am going to ask Your Honor—

The Court: But I simply won't permit it in the case in the sense that the jury is going to hear it.

Mr. Adler: All right. Oh, I see.

The Court: I have already heard what it is you propose to prove, and I won't permit you to prove it. It is on the record, what you proposed to prove.

* * * * * * *

Mr. Adler: May it please the Court, may I have the policy identified in requests for admissions marked for identification?

The Court: Has Mr. Detweiler seen it?

Mr. Detweiler: No objection, Your Honor.

Mr. Adler: He furnished it, Your Honor.

(Document entitled, "Family Automobile Policy, Lumbermens Mutual Casualty Company," was marked Exhibit P-2 for identification.)

[fol. 95]

. . . . . .

Mr. Adler: Your Honor, that is the case of the plaintiffs—that is the case of—that is the case of plaintiffs, Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, deceased.

. . . . . .

Mr. Nelson: If the Court please, I am offering in behalf of John Landis Harris and the estate of—in the Smith estate, the stipulations contained in this report of the supplemental pre-trial conference held December 7, 1962, before His Honor, Judge Van Dusen, in which it was stipulated as follows:

"(1) The following cases have been instituted in the courts of Delaware County, Pennsylvania, arising out of the accident which is the subject matter of this suit:

"Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, deceased, v. Edward S. Dutcher and Estate of John R. Lynch, deceased and Estate of Donald Cionci, Deceased, Common Pleas Court of Delaware County, No. 1950—or, December Term, 1959, No. 1047; and

"John Landis Harris v. Edward S. Dutcher and the Estate of John R. Lynch, Deceased, and Estate of Donald Cionci, Deceased, Common Pleas Court of Delaware County, December Term, 1959, No. 1048."

Mr. Adler: Your Honor—

The Court: Did you start to say that that stipulation is being offered only in the case of the Smith estate? I am not clear on who was offering it for what purpose.

[fol. 96] Mr. Adler: That was offered in the Smith estate; yes, Your Honor.

The Court: Only in the Smith estate?

Mr. Adler: That is correct, Your Honor.

The Court: It is not being offered in the Provident Tradesmens Bank and Trust Company,—

Mr. Adler: No, sir, Your Honor; but in view of—

The Court: —Estate of John Lynch case.

Mr. Adler: That is correct, Your Honor; but in view of that offer, that stipulation which has been admitted into evidence, with Mr. Detweiler's approval, I renew my offer which I made at side bar, Your Honor.

Mr. Detweiler: Renew what?

Mr. Adler: I renew my offer of proof which Your Honor denied at side bar.

The Court: Is that renewal of the offer based on some similarity between the two, between what has been stipulated in the one case and offered in the other?

Mr. Adler: No, because by that in evidence I think that I am entitled to place my offer into evidence to show what my concern and my basis in this declaratory judgment action is; otherwise I am left in an area in which the jury can only speculate.

[fol. 97] The Court: I will deny the motion.

Mr. Adler: And I also might point out that the fact that I am a named defendant in one of those actions would be prejudicial to me unless Your Honor granted my offer of proof.

The Court: I will deny the motion.

You will perhaps have an opportunity to renew it if the circumstances warrant.

* * * * * * *

JOHN LANDIS HARRIS, having been duly sworn, was examined and testified as follows:

Mr. Adler: Your Honor, I ask for an offer of proof.

The Court: Before we do, going back again to your offer of proof, this stipulation merely goes to the fact that a suit has been instituted arising out of this accident.

Now, if you will make an offer that only goes as far as this stipulation, I will reconsider that.

Mr. Detweiler: With respect to Lynch v. Cionci.

Yes; I wouldn't object to that.

Mr. Adler: Well, then I may—may I, without—Your Honor, may I renew—may I offer that much, with—and still preserve a—an exception as to the latter which you denied? [fol. 98] The Court: All right. I think that if you will simply read that into the record, in view of Mr. Detweiler's statement at the bar of the Court, it may now be considered as an admission or a stipulation that such a suit has been instituted, but that is as far as I am allowing the offer. I have overruled the offer beyond that point.

Mr. Adler: And granting me an exception, Your Honor, to the remainder.

The Court: Yes.

Mr. Adler: Yes.

Your Honor, may I then read into the plaintiff Lynch's case—with the Court's permission, I would like to refer to my case as the plaintiff Lynch's case in the order of brevity in the future.

In the United States—there was a cause of action filed in the United States—in the District Court of the United States for the Eastern District of Pennsylvania, Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased v. George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, Civil Action No. 25149.

Thank you.

Mr. Detweiler: Has Mr. Lynch been sworn?

The Court: Yes. He has been sworn.

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[fol. 99] (Recess from 3:50 to 4:00 o'clock p. m.)

(In chambers:)

The Court: All right.

Mr. Adler: Your Honor, before we start the offer of proof, I trust that Your Honor will deny it, but in view of preserving my position—and I think that I am bound by what Judge Van Dusen did at the supplemental pre-trial—

but just to preserve my position, may I renew my request that Your Honor sever for purposes of trial the case of Lynch from that of the remaining co-plaintiffs?

The Court: Judge Van Dusen has ruled on it?

Mr. Adler: Yes, sir.

The Court: All right. I deny the—

Mr. Adler: No—it is the second time he ruled with prejudice. He didn't say the second time, "Without prejudice."

The Court: I deny the request.

Mr. Nelson: The same motion, if Your Honor please, I make on behalf of Smith asking for a severance for the purpose of trial.

That was already ruled on by Judge Van Dusen also denying it.

The Court: All right; same ruling.

[fol. 100] Before we get started on this offer of proof, I want to be sure that the record makes abundantly clear where we stand now with respect to your earlier offer, and perhaps you can make a statement to the jury clarifying it.

Mr. Detweiler: Offer as to the judgment?

The Court: Yes; and that is that the—

Mr. Detweiler: I don't think it needs any clarification, Your Honor.

The Court: Well, we will see when we get finished here.

Perhaps it is sufficiently clear to the jury, because they are not aware, of course, of what went on at side bar.

As a result of my later action, there has now been admitted into evidence the fact that the estate of Lynch has instituted a suit in this court against the estate of Cionci.

Mr. Adler: That was the limits with which Your Honor permitted me to do it.

The Court: That is right; and you had earlier offered to prove what transpired in the course of the proceedings in that trial, and I denied your motion to prove beyond the fact of suit.

All right; that is where we stand.

Now we have a request for an offer.

Mr. Nelson: Before we proceed, I have here a pre-trial memorandum which I did not file at the time the others did because of the shortness of notice, but which isn't any different from the others.

[fol. 101] So shall I file this now so it will be part of this record?

The Court: I suggest you do, if you intend to put any testimony on.

Do you have any witnesses listed?

Mr. Detweiler: I don't see L. C. Pirrung on it.

Mr. Nelson: Who?

Mr. Detweiler: L. C. Pirrung.

Mr. Nelson: No.

Mr. Adler: Can I have a copy, Mr. Nelson?

Thank you.

The Court: Is there any objection to the submission of this pre-trial memorandum?

Mr. Detweiler: I would only like to ask what Litzenberg will testify to, if he is going to be called, the police officer or lieutenant of police, Litzenberg.

Mr. Adler: Well, he investigated the certain aspects of the accident, I understand.

Mr. Detweiler: Well, do you intend to call him?

Mr. Adler: Well, he may.

Mr. Nelson: I am not sure.

[fol. 102] Mr. Adler: He has to list witnesses that may be called, but in view of the fact that he has rested his case, of course, he will only call him now in rebuttal.

Mr. Detweiler: What do you intend to prove by him?

Mr. Nelson: I don't even know if we are going to call him, so that question doesn't come up.

Mr. Adler: He was granted the permission to file a pre-trial memorandum. If you object, you know, he can drop out of the case. But Judge Van Dusen said that if he—if he can't file a pre-trial memorandum, he gets severed.

Mr. Detweiler: This is like coming up with a new witness on the first day of trial.

The Court: Well, I don't know, because they closed their cases. I want to know why you are doing this.

Mr. Nelson: I offer to do that before the case is closed. The only reason, as all of us know here, with the exception of yourself, Judge Van Dusen asked me to file that, because all the other members of counsel did, and I didn't because I wasn't there at the time.

Mr. Detweiler: Well, perhaps this will clarify it.

Mr. Nelson: I don't think it affects us in any way, then, now.

[fol. 103] Mr. Detweiler: I have admitted Cionci was driving.

Mr. Adler: Well, that was what he was here for. So that is out.

Mr. Detweiler: Litzenberg was—

The Court: Well, that is why I am asking the question. If there had been any question, I assume he would have been offered as a witness heretofore.

Mr. Adler: That is right.

Mr. Nelson: Sure.

The Court: But the plaintiffs have rested their case and I don't really see any purpose for offering it or for objecting to it.

Mr. Adler: Well, he has told me his contention.

The Court: If nobody has any objection, I will accept the pre-trial memorandum,—

Mr. Detweiler: All right.

The Court: —if that was his only purpose. Mr. Detweiler has conceded, and it is on the record now, the concession that—

Mr. Nelson: Cionci was driving.

The Court: —Cionci was driving.

[fol. 104] Mr. Nelson: Right.

The Court: However, I will accept the pre-trial memorandum offered on behalf of plaintiffs John Landis Harris

and Sarah B. Smith, administratrix of the estate of Thomas W. Smith, deceased, and direct the clerk to docket it.

Now Mr. John Landis Harris was sworn in and on behalf of the defendant.

Mr. Detweiler: Yes.

The Court: Was that John Landis Harris?

Mr. Detweiler: John Landis Harris I will call as of cross-examination. He is a plaintiff in the case.

The Court: He is a plaintiff; and what is the offer of proof?

Mr. Detweiler: And ask him where he entered the car of Dutcher, where they drove.

I don't know what he is going to answer, because he has been isolated from me and I have been isolated from him.

Mr. Nelson: You said: Ask him where he entered the car and what was that? Where what?

Mr. Detweiler: Where they drove.

Mr. Nelson: Oh, where they drove.

Mr. Detweiler: He got in at Media and went up toward Bryn Mawr and then they had this accident.

[fol. 105] The Court: You asked for an offer of proof. That is the offer.

Mr. Adler: Your Honor, I object for several reasons:

No. 1, there is no—well, first I should say that under the Dead Man's Rule the testimony does not have to be adverse, but so long as there is an adverse interest.

Obviously John Landis Harris has an adverse interest to that of the estate of Lynch for the very simple reason that he has sued the estate of Lynch in the Delaware County Court, a direct plaintiff-defendant relationship.

Now, under the concept of adverse interest, as set forth in the Commonwealth Trust Company v. Szabo, which is referred to in my brief, there are two basic concepts which determine adversity.

One is that the judgment in this case bears a—bears a direct relationship, so that the witness will gain or lose by this judgment; and we submit that under that, Harris would not be adverse.

And the second string to the bow is that the record in this case will be or can be used in another action. Of course, there is no question about that, because he is a plaintiff, he has sued Lynch, and the testimony in this case will be pertinent in that—in the cause of actions in Delaware County, so that so far as the Dead Man's Rule is concerned, it applies to that latter concept of interest as set forth in the Commonwealth Trust Company v. Szabo.

I object, further, because at this point this may be totally immaterial, because the materiality of where he entered the car and where they drove is only material, first, and only then, after the scope of the permission is granted. Where he may have gotten in the car and where they drove is a—is totally immaterial until limits to the permission are [fol. 106] first established, and that has not been done, and I think that we, therefore, are putting the cart before the horse. The first thing that has to be put on and determined is: Is Edward Dutcher going to testify and is he a competent witness? And when that has been decided, then this may become material. At this point it is not material.

Mr. Detweiler: Well, that is merely a matter of order of proof. I can easily put Dutcher on first and then we are going to have the same discussion that we have about Dutcher's competency.

Now, it is quite true that Dutcher and Landis—and John Landis Harris have adverse interests in these two Delaware County suits, but they do not have adverse interests in this action here.

Landis is desirous of proving—or, Harris, rather, is desirous of proving that Cionci has coverage, and every party in this case has an interest adverse only to Lumbermens with respect to the issue in this case. Lumbermens stands alone. Everybody else wants to prove coverage extending to Cionci.

Their interest in the other case is entirely different. It has to do with negligence, agency and operation, and the record of this case cannot be submitted in the Delaware County suits, nor in the action here in the District Court,

the trespass action, because there is no materiality to it, and it has nothing to do with whether the plaintiff is entitled to recover from one, two or three defendants in those trespass actions.

That was fully discussed by Judge Van Dusen in a very comprehensive and very well considered opinion that he wrote, which is in the court file, and I filed a brief and a supplemental brief, and I don't think I can improve on it, [fol. 107] but I don't think that they are good, but I exhausted the subject as thoroughly as I could at that time, and Judge Van Dusen held that he did not have an adverse interest with respect to the issue in this case, which is merely one of coverage to Cionci. We then proceeded to trial.

The Court: You are speaking now of Harris?

Mr. Detweiler: I am speaking of everybody in the case.

The Court: Everybody, including Dutcher?

Mr. Detweiler: I say that Dutcher has no adverse interest, too.

The Court: No, no. I am simply asking you to clarify what it is that Judge Van Dusen ruled.

Mr. Detweiler: He ruled—he—the question of Harris' competency—

The Court: I have not had an opportunity to look at this file.

Mr. Detweiler: The question of Harris' competency was not raised at that time. It was a question of Dutcher's competency which arose on the motion to sever the plaintiffs, and that was the matter as to which he wrote an opinion holding that Dutcher did not have an interest adverse to any of the other parties in this case, particularly Cionci, with respect to this issue which is one of coverage to Cionci.

[fol. 108] I say the—exactly the same thing goes for Harris who is not even a decedent.

Mr. Adler: May I be heard, Your Honor?

The Court: Yes.

Mr. Adler: I think, Your Honor, that the order of proof in this case does become important, because—

The Court: Well, that is easy to take care of. I have no problem with that. I assume that Mr. Detweiler will get along with Mr. Dutcher if this becomes a—

Mr. Adler: Well, then may I put my guns on Dutcher, because that is the key issue in this case.

The Court: Well, that is what we had better get to talking about here.

Mr. Adler: Now, Your Honor, this issue came up before Judge Van Dusen when we filed a motion for severance for purposes of trial, which is outlined in my brief, we must do in order to preserve the Dead Man's Rule. Whether Your Honor grants it or does not grant it is not important, but whether we press for it is important, and we did press for it, and Judge Van Dusen, as the pre-trial Judge, ruled that he was not the proper judge to bring this issue before.

I don't hold to that opinion, but he so ruled, and then he wrote his opinion without prejudice, and which puts it in the nature of an advisory opinion, or, at best, dictum, that the Dead Man's Rule does not apply to Dutcher.

[fol. 109] Now, I would be naive if I did not accept the fact that an opinion by Judge Van Dusen, be it advisory or be it dictum, would not have its effect on the Court and, therefore, I take the burden on of showing Your Honor where Judge Van Dusen erred.

Now, this is without prejudice, so that you are—it is not the law of the case and you are not bound by it, but I have a tremendous burden of showing Your Honor where Judge Van Dusen erred, and I accept that burden, and I accept it in my brief, but I would like to outline it very briefly to Your Honor.

Judge Van Dusen applied the Bilbo case, which is Bilbo v. Bilbo. In Bilbo—

Mr. Nelson: Billow.

Mr. Adler: Billow, rather—thank you—in Billow, the Court, which—which is an earlier opinion than Commonwealth Trust Company v. Szabo, said that the rule of interest concerns itself whether the defendant—or, I

shouldn't say "defendant"—whether the party or the witness will gain or lose by the judgment in the particular case in which he is testifying.

Now, Judge Van Dusen then touched upon the issue, but he took a wrong turn at that point.

Now, here is what Judge Van Dusen said in his opinion: He says that:

"The insurance company has obligated itself to defend Dutcher in the pending suits against him and to pay any obligation he incurs in those suits up to the policy limit. Therefore, a determination as to whether the insurance company is also obligated to the Cionci estate or others is not adverse to his position."

[fol. 110] Now, let us examine that.

We have filed an interrogatory on Lumbermens asking what the policy limits are. We felt that it is an important aspect of the case for just this reason. Judge Van Dusen denied the interrogatory, except that the Lumbermens was required to say whether or not the amount was $10,000 or more than ten thousand. That they had to answer. They answered that it was more than ten thousand.

He attuned this entire interrogatory to jurisdiction, which was not our concern at all. Our concern was with the Dead Man's Rule.

So for the purposes of this argument we have to deal with abstracts. But this we do know: By their very—by the affidavits in this case and by every other fact in this case, the policy limits are finite—they are not infinite—which we know, anyway, from a matter of experience. Policy limits are never infinite. The insurance company agrees to defend you up to a certain amount and no more.

Now, with a finite limit to the policy, and keeping—

The Court: Is there any such thing as an infinite?

Mr. Adler: No; there isn't; but I have to—I have to deal with abstract terms, because I—I can't deal with the —the detail, because it was denied us. So we must accept

that there is a finite amount of coverage, and that is important to my argument.

Granted that there is a finite amount of coverage, and granted that Edward Dutcher is a co-defendant in the actions in Delaware County, which I think from the testimony already given Your Honor, Your Honor can see are serious suits and serious injuries—at least one man is dead [fol. 111] —it is of immediate gain or loss to Dutcher on what happens in this case, and for this reason:

If the estate of Cionci is denied the coverage of Lumbermens Mutual, then the entire coverage of the policy is given to Dutcher, and any judgments against Dutcher in Delaware County, he is accorded that additional protection.

Let us turn the coin the other way: If the judgment in this case is that Cionci—that the estate of Lynch prevails—and now, of course, I am speaking only for the estate of Lynch, whom I represent—if the estate of Lynch prevails here and the Cionci estate is granted—becomes an assured under the policy, then—and this is where—why I was anxious to press onto the record my offer of proof—then the coverage is reduced by the amount of judgment or any amount that has been compromised under that judgment, which is the $50,000 and, therefore, Dutcher is denied coverage up to that amount, $50,000, and, therefore, he is to that extent more vulnerable to an excess judgment in the suits in Delaware County, because to that extent he becomes a candidate for an ex—a judgment in excess of his coverage, so that he has a direct gain or loss in this cause of action, and that is what Judge Van Dusen touched upon and recognized the issue and then completely missed the import of it.

And I said to Your Honor, "I accept the burden of proving that Judge Van Dusen is wrong," and I think I have met that burden. There is a direct gain or loss to Dutcher in this cause of action and by the judgment in this cause of action, and I am talking about the estate of Lynch.

The Court: I suppose I should turn the discussion at

this point in the direction of to what extent am I free to disregard what Judge Van Dusen has determined?

[fol. 112] Mr. Adler: Your Honor is absolutely free to disregard it, because he has specifically made his ruling without prejudice, and it is not the law of the case.

The Court: See if you can find his opinion for me. What date was this opinion handed down?

Mr. Adler: I think we can probably run it down.

The Court: I have it here, I think.

Mr. Adler: My confrere here is the most organized lawyer I have ever seen.

The Court: I have it here.

Mr. Detweiler: He left it open to Your Honor.

Mr. Graf: It was filed October 23, Your Honor, 1962.

The Court: I would like to hear some more from you, then, Mr. Detweiler. It certainly makes a lot of sense.

Mr. Detweiler: That is the one circumstance under which Dutcher might be deprived of coverage, because the coverage can only be paid out to only one assured—once it is used, it is used, and it is not available over again to another assured—and so I can conceive of the situation where there might be more than the remainder of the policy.

As Your Honor knows, all policies are written, let us say, 10-20. If the ten were used in the Cionci judgment here in this action in this court, that ten for one person would be consumed, and if the other two actions in Delaware [fol. 113] County brought more than ten thousand, Dutcher could be faced with an excess liability.

The Court: It seems rather obvious.

Mr. Detweiler: Yes. There is no doubt about that.

The decisions have held, however, that the question is his interest in this one case, and I don't see any interest in this case. He is not a party to this suit.

The Court: Whom?

Mr. Detweiler: Dutcher is not a party to the declaratory judgment action, he is not a party to the suit in this court, the trespass suit in this court, and they say the re-

mote likelihood that he may be affected by other suits, is not sufficient.

The Court: Oh, I don't think we can consider it as a remote possibility, particularly in view of the answer to the interrogatory or particularly in view of the lack of information. All that we can assume is that it is $10,001—that is all we can assume at this stage—

Mr. Detweiler: Yes. I don't think it makes any difference how much.

The Court: —and the defendant for its own purposes in many lawsuits objects to this type of information being given, and I assume in this case it still objects, and, therefore, I think that the other side is justified in assuming that the amount that is involved here in coverage is $10,001 and no more.

[fol. 114] Mr. Detweiler: Then we have this proposition, Your Honor, that there is a living plaintiff here, and the—Dutcher's interest is not adverse to him, that, therefore, he would be entitled to testify to what this arrangement was as far as John Landis Harris is concerned, and that would—

The Court: Is that one of the persons as to whom no severance was granted?

Mr. Detweiler: That is right. He is one of the plaintiffs in this case.

The Court: Well, then, in view of that ruling, about which I can do nothing, I will have to consider the disability against one as the disability against all, rather than vice versa. It just seems to me that it would follow. I don't know. This is a difficult thing.

Mr. Adler: Well, I wouldn't want to lead Your Honor into error there.

I think the obverse is true, Your Honor, there, that it can be admitted as to the living witness, but then Your Honor has to instruct the jury, and that is why a severance is so important in this case, to disregard it as to the—the deceased man.

Mr. Detweiler: I don't think that is so.

The Court: Are we talking in terms of creating a record, gentlemen, or are we talking in terms of practical facts?

Mr. Adler: No—actually, in practical effect, Your Honor, if Your Honor rules that Dutcher is incompetent, then we [fol. 115] are entitled to a judgment, as a matter of law, because there is no other—by their own admission there is no other witness to the permission and, therefore, there is no testimony to rebut the presumption; so that, if Your Honor rules that Dutcher is incompetent, then, so far as the Lynch estate is concerned, the case is over.

Mr. Detweiler: Well, here is my suggestion now: This is a practical suggestion:

The Court: Yes, I would like to hear practical suggestions,—

Mr. Detweiler: If you deny—

The Court: —because if I am going to admit this testimony, permit him to testify, and then tell the jury, "However, you are only permitted to listen to what he has to say as respects one person"—

Mr. Detweiler: I don't think you can do that.

The Court: That is what I am talking about.

Mr. Adler: Well, Chief Justice—

Mr. Detweiler: No—here is my practical suggestion: If you don't permit him to testify, that is the end of the case, and if you are wrong it has to be tried over; if you do permit him to testify, the jury may find against him, against Lumbermens, and that is a conclusion of the case. Then if they find in favor of Lumbermens, and it turns out you are in error, that can simply be corrected by [fol. 116] entry of judgment in the opposite direction without a new trial.

Mr. Adler: May I—may I say this, Your Honor: I think that that is never a way for a Court to handle it, because the plaintiff takes the burden of pressing at this point. If he is wrong, the plaintiff takes the burden of an appeal, and this case—we have only spent an hour's testimony, and

if Your Honor is wrong—and I submit that I don't see how Your Honor could possibly be wrong, because the interest here is so clear-cut.

I will take the—

The Court: Wait a minute. Wait a minute now.

That is, according to your own statement now, I have to start separating the plaintiffs or what have you here.

I am still having difficulty and somebody before this day is over had better draw me up a diagram of the personae dramatis here.

Mr. Adler: May I just review the cases for Your Honor? So that I think I could perhaps help Your Honor on that point.

The Court: Well, but before you do, taking your own statement that the proper way to handle this would be to say, "Permit Mr. Dutcher to testify, but instruct the jury that you may only consider this testimony as it deals with the living opponent, who is John Landis Harris; you may not consider it with respect to the other plaintiff, who is Provident Tradesmens, Administrator of the Estate of John R. Lynch," aren't you saying, in effect, that at this stage, then, if I were to rule that way, that judgment must [fol. 117] necessarily be granted at this stage in favor of Provident Tradesmens—

Mr. Adler: Yes, sir.

The Court: —in the Lynch case?

Mr. Adler: Yes. I said, Your Honor, that the—may—maybe I didn't make myself clear. I said, Your Honor, that in the—in this type of case the courts have ruled that Your Honor can—they prefer a severance—but in this event that you don't sever, you are—they have ruled that Your Honor can rectify any harm done by instructing the jury that the jury can only hear this evidence and must separate the evidence in their mind.

That has been very much criticized by a lot of judges as an impossibility, but the Supreme Court has said, "Given proper instructions, that can be done."

But that is in the ordinary type of case. In this particular case, where there are no other witnesses—

The Court: Well, why do you want me to do this?

Mr. Adler: I don't want Your Honor to do it. I want Your Honor, if Your Honor finds that Dutcher is incompetent—and I have submitted, I think, sufficient legal evidence to that effect—then I want Your Honor to find and—and instruct the jury that there is no evidence against the estate of Lynch and, therefore, they cannot find a verdict, because there is no evidence against the estate of Lynch—

Mr. Detweiler: Why do you have to do that?

Mr. Adler: —and we will drop out of the case.

[fol. 118] Mr. Detweiler: Why do you have to do that?

Mr. Adler: Because we are entitled to it under the law.

Mr. Detweiler: If you are right about that, let the jury come in with whatever verdict they want, and then you can enter judgment in favor of Provident, in spite of their finding, if it is in our favor, with respect to the Harris estate.

Mr. Adler: Your Honor, I—it would open undue hardship on the plaintiff, because under the Dead Man's Rule the possibilities of waiver are—

The Court: Off the record—

(Discussion off the record.)

Mr. Adler: There is such a thing—what Mr. Detweiler is gambling for is that in—in permitting this case to go ahead and trying to persuade Your Honor to go ahead, that I may make some mistake by cross-examining or make some mistake in the rebuttal and thereby waive the Dead Man's Rule.

Mr. Detweiler: That is not fair—

Mr. Adler: Well, that is a frightening—

Mr. Detweiler: That is not fair, to say I gamble about any case.

Mr. Adler: All right. That will—

[fol. 119] Mr. Detweiler: I represent a client to the best of my ability.

Mr. Adler: I know you do, and you are doing a fine job for him.

Mr. Detweiler: And I don't do any gambling and I don't do anything tricky, if that is what you are inferring.

Mr. Adler: It places a burden upon me. It is an unfair burden, Your Honor, which is just as unfair if the plaintiff has not made out a case—and Mr. Detweiler represents a lot of defendants—and he moves for a non-suit, and it is clear that he is entitled to a non-suit, for the plaintiff to insist—and he would be the first to scream bloody murder: "Let the defendant put on its case and Your Honor can always make a ruling at the very end of the case," and what could very well happen—it does happen—is that something may come up in the defendant's case that would establish the plaintiff's case. It is totally unfair to place that burden on a party litigant.

At this posture of the case I submit to Your Honor that Dutcher is incompetent, and I ask that Your Honor so rule, and that at that point I drop out of the case.

The Court: And what would be left, then? John Landis Harris?

Mr. Adler: Just John Landis Harris—and that is all.

The Court: John Landis Harris and Sarah Smith, administratrix of the estate of Thomas Smith?

[fol. 120] Mr. Adler: Well, Smith would be—

The Court: Who was Thomas Smith?

Mr. Adler: He was the guy in the truck.

Mr. Detweiler: He was the decedent who was operating the other car that collided with the Dutcher car.

The Court: Which? The John Landis Harris car?

Mr. Detweiler: No. Harris was in the Dutcher car. These two men riding in the Dutcher car picked up Harris in Media.

The Court: Oh, I am sorry. Let me start over again. I was misreading the names "Harris" and "Smith," even though I realized I was pronouncing them correctly.

Mr. Adler: If Mr.— Perhaps I can give Your Honor the rundown.

The Court: Go back now and let us have these persons. It is obvious that I have not yet gotten them straight in my mind.

Mr. Adler: Could we give them short names which would make it a lot easier, Your Honor?

Provident Tradesmens is Lynch, if we can just start with a—with a dramatic cast. Provident Tradesmens is Lynch.

The Court: Wait. You will have to identify them further.

Lynch was in the Dutcher car?

[fol. 121] Mr. Adler: That is right. He was the—

Mr. Detweiler: That is correct.

Mr. Adler: In the non-driver's.

The Court: I don't want detail, only when I ask you for detail.

Provident Tradesmens and Lynch in Dutcher car, and they are suing—

Mr. Detweiler: Cionci.

Mr. Adler: Cionci.

The Court: Versus Cionci and Lumbermens.

Mr. Adler: In this action, yes, Your Honor.

Mr. Graf: There is a diagram, Your Honor, of the parties and the attorneys.

The Court: Yes, yes. This is the sort of thing I wanted. All right. Smith car—that was a truck; right?

Mr. Graf: It was a pickup truck.

Mr. Nelson: That is right. Yes, sir.

Mr. Graf: Yes, sir.

The Court: All right. Let me see now if I can recap [fol. 122] it from here: Smith was the driver of the truck represented by—

Mr. Nelson: That is right, Nelson.

The Court: —Mr. Nelson.

Mr. Nelson: That is right.

The Court: And that is Sarah Smith, the administratrix of.

Mr. Nelson: The estate; yes, sir.

The Court: And he is dead.

Mr. Nelson: Right.

The Court: Smith is dead.

And the estate of Smith is suing Lumbermens and Cionci in this proceeding?

Mr. Detweiler: No, no. He is suing—

Mr. Graf: Yes; they are. They are.

Mr. Nelson: We are suing Dutcher, really.

Mr. Detweiler: Oh, in this proceeding?

The Court: In this proceeding, yes.

Mr. Detweiler: Oh, yes.

[fol. 123] The Court: Let us take them one at a time.

Mr. Detweiler: Yes.

The Court: O. K.

Smith, that is the Smith estate, is suing Lumbermens and Cionci; the estate of Lynch we have against Lumbermens and Cionci; and Lumbermens is in the picture because the car in which Cionci and Lynch were was the property of Dutcher, an assured of Lumbermens.

Harris—

Mr. Adler: Was in the Dutcher car, Your Honor.

The Court: —was in the Dutcher car driven now by Cionci, and he also is a plaintiff.

Harris: Passenger in Dutcher-Cionci car versus Lumbermens and Cionci.

* * * * * * *

The Court: Now, if I, therefore, rule Dutcher incompetent, it would leave him available to testify only in the case of Harris against Lumbermens and Cionci; isn't that so?

Mr. Detweiler: I don't agree that that is so. I can see your reason for saying it, but the Courts have said: If it is admissible as against one it is admissible as against all. They said that in the Billow case, in 360, I think it was.

Mr. Adler: No. I have covered that in the cases, Your Honor. It is not—that is not the law.

[fol. 124] Mr. Detweiler: Judge Van Dusen said you conceded that. I was looking for it in your brief,—

Mr. Adler: No, sir.

Mr. Detweiler: —and I can't find your brief now.

Here is what Judge Van Dusen said: He said:

"Provident believes that if Dutcher is competent against one or both of the other plaintiffs, his testimony would be admissible against it, Provident, under the decision in Thomas v. Roland, 167 Fed. Supp., 622."

Mr. Adler: Now, let me—that is covered completely in my brief, Your Honor. Thomas v. Roland, I have covered that in the—with the section of the brief beginning with the Page 9.

In Thomas v. Roland there was language by Judge Grim that would indicate that otherwise incompetent witnesses may be competent in some of the other cases that are being tried at the same time. He didn't state, however, what the effect would be of that testimony in the cases in which the witnesses were incompetent.

He relied on Dennick v. Scheiwer, but in Dennick v. Scheiwer the plaintiff had brought two cases, which is very oftenly done—often done, of wrongful death action and a survival action.

Now, the Dead Man's Rule does not apply when the plaintiff brings a wrongful death action; therefore, the Dead Man's Rule would apply in the survival action but not apply in the death action.

And in that case the jury said that where the plaintiff brings both causes of action together, he can't complain and ask that the Court tell the jury to listen with one ear [fol. 125] to one case and not with the other, and in Thomas v. Tomay, which is the next case listed on Page 10, the Supreme Court implies that it is a duty of the party to ask for separate trials, and he can waive the advantage of a separate trial as compared with the inconvenience and additional expense of a separate trial. If he doesn't want the inconvenience and additional expense of a separate trial, then he can't complain if he—if the cases are tried together and the testimony goes in to the jury.

However, in Kuhns v. Brugger, where the defendant, the estate, the dead defendant, asked for separate trials, and the lower court denied it, and the testimony went in the—and then they asked for a new trial after the case was over.

The Supreme Court had said that he was not entitled to a new trial, because, aside from this witness who was incompetent to testify against the estate, there was other sufficient evidence by which the jury could find him guilty, and they then said that in view of the fact that the Court charged this jury that they must not consider the testimony of this otherwise incompetent witness against the estate, there was no harm done.

Chief Justice Bell said that it was ridiculous to think that a jury could compartmentalize their minds and he thought it was a very poor procedure.

You have to remember, however, in this particular case, the Kuhns v. Brugger case, there was a 12-year-old kid who had become a paraplegic, and if they didn't find against the estate there was just not going to be any coverage. The estate happened to be the president of the American Sterilizer Company. He had left a revolver loose in his room, and there was a—there was a strong sympathy factor there. I think the Supreme Court leaned over backward to find a basis for upholding the verdict.

[fol. 126] But even in that case they said that the jury—the judge must instruct the jury to disregard the incompetent witness as to the estate and disregard their testimony, and then they found that there was other sufficient testimony by which the estate could have been held; and the same thing was in Solinger v. Himchak, which is the latest case.

The Court: Wait a minute before you go any further.

Is that an accurate reflection of the law, that even though the testimony goes in the jury must be instructed to disregard it as to the estates?

Mr. Detweiler: That is not my understanding, Your Honor.

Mr. Adler: No—there are two cases right here, Your Honor, that I can pull and show Your Honor.

The Court: Well, I am not going to rule on any aspect of this tonight. I will hold it under advisement.

I don't know when I am going to have a chance to check these things, but I will certainly try to do it before we go into court in the morning.

But it would certainly appear to me that if that is an accurate statement of Pennsylvania law, that the testimony would go in, but the jury be instructed to disregard that testimony as to the two estates, if that is the only testimony that is to be offered, then I see no harm, if I were to determine that Dutcher is incompetent as to these two estates, after ruling on that, after ruling that the competence would be limited only to the living party, to grant a motion at that stage by the plaintiff estates, by the administrators of the two estates,—

[fol. 127] Mr. Detweiler: I think you would, because the pres—

The Court: —because, again—

Mr. Detweiler: I think you would, because the presumption that the operator is driving with the permission of the owner would not have been refuted in those cases.

The Court: That is what I say.

Mr. Detweiler: Yes.

The Court: That is my point.

In other words, I think it would be impractical, actually, if—and here we have it clearly delineated—if the testimony of the incompetent witness is the only testimony to be offered. I know there are certain cases, there are certain situations where it cannot be avoided, that you must let some testimony in and then tell the jury to do what we all regard as a virtually impossible thing: "Now that you have heard it, disregard it for this purpose, for that purpose, or the other purpose."

If I were to determine that Dutcher is incompetent to testify against the estate of Lynch and the estate of Smith,

and if there is no other testimony to be offered—and apparently there is an admission here on this limited permission that was granted—then I wouldn't be faced or I wouldn't have to confront the jury with this almost impossible task of hearing and then disregarding.

Mr. Detweiler: Well, that was why I said a few minutes ago, if you reach that conclusion you wouldn't have to do [fol. 128] anything in instructing the jury. Let them reach their decision.

The Court: I could direct a verdict.

Mr. Detweiler: Let them reach their decision, and if the verdict came in in favor of Lumbermens, you could simply enter judgment n.o.v. in favor of the plaintiffs, for the deceased plaintiffs.

The Court: Well, wouldn't we have the same effect, though, after you conclude this testimony and after I have instructed the jury? Wouldn't I be compelled to instruct the jury that you must under the testimony return a verdict for—

Mr. Detweiler: Well, now, what will happen in this situation, Your Honor: Suppose you conclude that what you have been saying is the way to handle it, and the jury brought in a verdict in favor of Lumbermens as to the living plaintiff, and you had directed a verdict in favor of the deceased plaintiffs; and then I could convince Your Honor that you had been wrong, what would then happen? Would you enter judgment in favor of the Lumbermens in all three cases?

The Court: Convince me I would be wrong in what regard?

Mr. Detweiler: About—about holding—in holding that Dutcher was not competent as to the decedents, although he was as to the living plaintiff.

[fol. 129] The Court: You will have to try to convince me now, because once—I mean, if I am convinced legally that Dutcher is incompetent as to these two estates, what will I instruct the jury? What will be my instructions to the

jury? Simply to, "Listen, you have listened now, but what you have listened to must only be applied against"—

Mr. Detweiler: Oh, no. I think it can be made very simple. All you have to do is submit an interrogatory or two interrogatories: Do you find that these two men were driving at the time of the accident with the permission of the named assured? And if they say, "Yes," then you enter judgment. They are not going to bring in a verdict. They are going to answer interrogatories. Then you enter judgment in favor of Lumbermens as to Harris and in favor of the Smith estate, of the Lynch estate.

Mr. Adler: Well, that is based upon incompetent testimony.

Mr. Detweiler: Why burden the jury with the problem that they don't have to grapple with? It is purely a legal problem.

Mr. Adler: Well, it is not a legal problem; it is a factual problem.

Mr. Detweiler: Oh, of course, it is a legal problem.

Mr. Adler: And in—wisely or unwisely—I think in this case wisely—the Dead Man's Rule applies, and if ever a Dead Man's Rule was justified, it is in this case, because [fol. 130] Dutcher knows that the only other two people to this conversation are dead and there is nothing to constrain him from saying whatever he wants to say.

The Court: Just a moment, Mr. Adler.

What we are all talking about, really, is a method of procedure of apparently accomplishing the same result. I gather from what Mr. Detweiler just said that there is virtual agreement here that if Dutcher is an incompetent witness, judgment must be entered for the two estates, the estate of Lynch and the estate of Smith; is that correct?

Mr. Detweiler: Yes.

Mr. Adler: Well, I can't—that would be my opinion, but I don't represent him, Harris.

The Court: You are not in that case. I didn't mark down who is representing him.

Mr. Nelson: I am, Nelson.

Mr. Graf: This is Mr. Nelson.

Mr. Nelson: I represent him.

The Court: You are representing Harris.

Mr. Nelson: And I have to agree to that.

The Court: You have to agree.

Now, gentlemen, all we are really talking about is, as Mr. Detweiler suggested, the issue of fact whether Cionci [fol. 131] was driving with the permission of the named assured, Dutcher.

Mr. Detweiler: The named assured, Dutcher.

The Court: Can we not then stipulate that the only issue to be submitted to this jury, without complication or confusion as to whom that testimony is being allowed in against, that it can only be binding upon Harris, unless I rule ultimately that Dutcher was competent with respect to the two estates?

In other words, the stipulation would simply be that the case would proceed, if I should determine at this stage—and actually I wouldn't have to determine at this stage—I would simply determine that Dutcher may testify, reserving to you the right to convince me that he is incompetent to testify as to the two estates, Provident Tradesmens, the estate of Lynch, and Sarah Smith, the estate of Smith. If I rule that he is incompetent as to those estates, Mr. Detweiler has agreed that judgment may be entered in favor of those two estates.

Mr. Adler: Now, there is a great danger.

Mr. Detweiler: Subject, of course, to my right to go further with it.

Mr. Adler: That is what Mr. Detweiler—

The Court: To take an appeal.

Mr. Detweiler: Sure.

[fol. 132] The Court: Of course, I don't mean you are bound, but this would be the procedure we are discussing.

Mr. Adler: Your Honor, there is a grave danger in that and it places a tremendous burden on me, for this reason,

if I may say so: At this point I think I have presented certain law to Your Honor and certain argument which I think indicates that Dutcher is not competent to testify as against Lynch, and Mr. Nelson would undoubtedly press the same argument for the estate of Smith.

Now, at this posture, to put it as succinctly as possible, if Your Honor so rules, I am entitled to pick up my marbles and go home, because at that point I am entitled to a case, and that is important for me, to go home, for this reason:

The concept—

The Court: Well, Mr. Adler, that is simply not so. Mr. Detweiler still has the right to take an appeal from my ruling. I am not infallible.

Mr. Adler: Well, that is the burden—that is the burden that anybody who presses for this type of decision undertakes. If, for instance, Mr. Detweiler presses in cases, as I am sure he has, for a non-suit, if he gets the non-suit then he has to face a possible appeal, or even a motion to reconsider or anything else that goes to it.

This case has only taken—the plaintiffs' case has only taken one hour. There has not been a tremendous amount of expense or witnesses put on.

The Court: Well, all I am suggesting to you at this stage, Mr. Adler, is that you are pushing me into position to accept Judge Van Dusen's ruling in view of the shortage [fol. 133] of time that is available and in the midst of a trial to have to resolve an issue of this sort.

The procedure that I have suggested seems to me to allow for a little more time to consider this problem.

In other words, the jury here would very simply resolve a fact issue, and I will determine, procedurally, by agreement with all of you as to which of these parties shall be bound by the jury's findings, depending on what I determine to be his competence to testify.

Mr. Adler: Well, would Your Honor then insulate me from—if I cross-examine these witnesses, insulate me from any waiver? That is my only concern.

The Court: It seems to me that if you want to protect yourself completely in the position in which you are, convinced that you are correct, you will not cross-examine. It is as simple as all that, isn't it? You will let this witness say what he has to say. Your position—well, I am not too sure that is true, either.

Mr. Graf: No, sir.

Mr. Adler: That places a difficulty on me, Your Honor.

Mr. Graf: No, sir.

Mr. Adler: Because, if Your Honor ruled against me, I would then vigorously cross-examine and I would be protected. If Your Honor rules for me, then I—I—I am through.

Now, of course, if Your Honor insulates me and Mr. [fol. 134] Detweiler agrees that I be so insulated, then I think that Your Honor's suggestion is an excellent suggestion.

Mr. Detweiler: Well, Pete, do you think that if the judge does as you ask him to do, gives you binding instructions that—immediately, and then the verdict goes in my favor, that you would have a right to come back and put my man on the stand and cross-examine him? I don't.

Mr. Adler: Well, I think the—

Mr. Detweiler: We all have decisions to make. You got to make that decision. If you are satisfied that you are right, you be guided accordingly. If you are in doubt, you got to take your chances.

Mr. Adler: No, no. If I may—

The Court: No. He has a point here, Mr. Detweiler.

Mr. Adler: No, no.

The Court: I am a little concerned. This is probably true. At this stage he has his objection on the record, and if I were to grant his motion at this stage to rule that Dutcher is incompetent as to the two estates, procedurally this poses a real problem. Wouldn't you still have to wait then until the conclusion of the defendants' case before submitting a point for binding instructions?

I can't grant a point at this stage, because the defendant hasn't put on his defense and your case is not such that I can put on such a defense.

Now, the stage at which we find ourselves is that we are [fol. 135] in the defendants' case. You have asked for an offer of proof as to John Landis Harris. You have raised a question here of order of proof, which then raises the question of the competence of Dutcher as a witness because of the Dead Man's Rule.

First, assume that I were to rule in your favor. Until Dutcher has testified and until Harris has testified, to the extent that he may testify and to the extent that he may be competent, until the defendant has put on its entire defense, whatever it may be, am I in a position to grant you a point for binding instructions?

Mr. Adler: Under the Exner case, yes.

The Court: What case?

Mr. Adler: Exner.

The Court: Exner; and what is the procedural route to that?

Mr. Adler: Well, the procedural route, of course, has been muddied by, I think, the lack of severance for purposes of trial which should have been granted, and I don't know that Your Honor could not at any time, as the trial judge, when faced upon a situation in which injustice or inequity might occur, have the right to sever in order to simplify the trial.

We are in somewhat of a morass, because as the case has now developed, the cases should be settled, and—

The Court: Well, Mr. Adler, just assume this, that if Judge Van Dusen ruled with prejudice against a severance, [fol. 136] regardless of what the law may be, as far as I am concerned, that is the law of the case.

Mr. Adler: In his original opinion, Judge Luongo—

The Court: Well, we don't go back to the original opinion; we go back to the most recent action which he took, and if that was as you indicated to me, with preju-

dice, the denial of the motion for severance, then we should just leave that as part of history.

Mr. Adler: Right.

The Court: Nothing will be done about it.

Mr. Adler: I would still be entitled, Your Honor, if the —there has been an offer of proof here for Harris, and it has been conceded by Mr. Detweiler that perhaps the order of proof is not perfect and that it is not material until Dutcher has testified as to the scope of the permission.

Mr. Detweiler: I haven't conceded that.

Mr. Adler: Well, if Mr. Detweiler says he has not conceded that, I will withdraw that statement. I understood that he did.

But, in any event, I think it has been charged by the plaintiff that Harris is not competent until such time as the scope of permission has been delineated. It is also in the record that only Dutcher is available to testify as to the scope of that permission.

If Your Honor rules that Dutcher is incompetent as to the plaintiffs, then at that posture of the case we will stand mute.

[fol. 137] Mr. Graf: Wait a minute. Let me say this, Pete:

Your Honor, Judge Van Dusen has not ruled that the motion was denied with prejudice. He handed down an order here just within the last—I think it was on December 7—and that order specifically was limited to the question of whether or not Mr. Detweiler may amend his pretrial memo.

Judge Van Dusen in a pre-trial memo, subsequent pretrial memo, simply said: "Motions for severance made on behalf of all plaintiffs were denied." He was not ruling. This is not an order when he says—

Now we go back to his original opinion. In his original opinion he ruled on October 23rd, '62, after consideration of various items, it is denied, without prejudice.

Now, he has not changed that order in any manner whatsoever.

The Court: Mr. Detweiler, what is the basis for the statement—and I don't know who made it—that the denial of the motion for severance was with prejudice?

Mr. Detweiler: I think Your Honor made it.

The Court: My recollection is Mr. Adler made the statement.

Mr. Detweiler: I don't know who made it, but I didn't make it.

The Court: Oh, no—I certainly didn't make the statement, because I knew nothing about it—

Mr. Adler: I might be in error.

[fol. 138] The Court: —until you walked into court.

Mr. Adler: Your Honor, I might be in error, and I don't want to—I don't want to mislead the Court, and I think Mr. Graf raises an interesting question.

In the pre—in the latest—in the report of the supplemental pre-trial conference held 12-7-62, he said, "Motions for severance made on behalf of all plaintiffs were denied." Now, when he didn't say, "without prejudice," I may have mistakenly assumed that—that it was with prejudice.

Mr. Detweiler: What is the date of that order?

Mr. Adler: 12-7-62.

It is not an order; it is a report.

Mr. Graf: It is a report, a supplemental report.

Mr. Adler: And Mr. Graf raises the question that that is not mentioned in the order, and if it is not mentioned in the order, then—then the fact that the denial is without prejudice stands.

I—I have to take the responsibility of misleading the Court in that regard, but I—I think that my error was an honest one, Your Honor. I was looking at the report rather than the order. I was looking at the report, Your Honor, and I see that the order does not make any mention of that.

The Court: Just a moment, please. I have to see something in the file here.

Mr. Graf: Your Honor, may I go and obtain 402 Pennsylvania, the Exner case?

[fol. 139] The Court: We will get it. We will get it.

Mr. Graf: 402, please.

The Court: I don't think it is going to serve any purpose, because I am not going to try to decide this thing by just looking at one opinion or another.

Mr. Graf: No. We just wanted Your Honor to see the opinion.

Mr. Detweiler: Their procedure doesn't govern ours, and their procedure, what you are talking about, was in the nature of dicta, anyhow.

Mr. Graf: No—it was right on the point.

Mr. Adler: I don't think the severance is too material, frankly.

The Court: What difference does it make whether there is a severance or not a severance? If the law is that this witness Dutcher is incompetent with respect to these two estates, there is no testimony by which the defendant can overcome this presumption.

If there are no other problems to be considered, I will take this matter under advisement and we will consider, perhaps by the time we get back into court tomorrow morning, whether the law is that Dutcher is incompetent as to the two estates.

I will then determine upon the procedure by which to arrive at what appears to be the agreed result in the event that he is not competent, without binding anyone here.

[fol. 140] Mr. Detweiler: May I leave this one last thought with Your Honor on the question of competency and interest, adverse interest: The possibility that he does have an adverse interest, even under the circumstances related by Mr. Adler, are extremely remote. He can only be held in the other two cases if there is agency proven—there wasn't even permission—and there isn't the remotest chance that he is going to be held in those two cases out there and need all the coverage of the policy.

The Court: Well, I think that this is where the question of adversity comes in, doesn't it?

Mr. Detweiler: Yes.

The Court: Whether there is going to be any proof of—

Mr. Detweiler: That is it. That is it. If Your Honor is going to make your decision on the basis of a possible adverse interest in other actions, then I say it is just about impossible. You are assuming something that you can't assume.

The Court: Well, now, I don't think that is the question, when we talk about an adverse interest as opposed to a possible adverse interest. An interest is either adverse or it is not adverse.

Mr. Detweiler: Not according to the decisions.

The Court: Is that so?

All right.

[fol. 141] Mr. Detweiler: Well, let me put it this way: I still say—

The Court: Before I go putting my legal foot into my mouth any more than I have to, I think that that only demonstrates the wisdom of my saying I will take this under advisement and while waiting for the other jury to come back and while I have nothing better to do—

Mr. Detweiler: All I am saying is that the decisions say and Judge Van Dusen said in his opinion: We are not concerned with a remote possible adverse interest in some other action.

Mr. Adler: Yes; but that is not the case. The case is the interest affected in this case, and he has a direct affecting, and the ultimate financial effect of that interest is not important, because Alcorn v. Cook, which I cited on Page 7 of my brief, is a case almost on point, where the question of incompetency came up of a—of a woman who had an interest in an estate, and the other side argued and they said, "Well, there is no proof here that the estate is not completely solvent and can meet all the debts and, therefore, she will—she will get her devise regardless of the decision in this case," and the Court said that is not the test.

The fact is that it may be affected by—is the—is the effect of her interest as of right now is affected, is the test, not what the eventual outcome may be.

Mr. Detweiler: Well, now, you have no proof of that.

The Court: Well, let me just ask this one question, [fol. 142] Mr. Detweiler, and this is really in the nature of an off-the-record comment.

Has it ever been known for an insurance company to cancel out on a policyholder after having paid a substantial claim?

Mr. Detweiler: I don't quite know what Your Honor means by that.

The Court: After the termination of the then current policy here, has an insurance company ever been known to cancel out an insured because it had been compelled during that year to pay a substantial claim?

Mr. Detweiler: Well, in my experience—and that is all I can tell you—that alone does not cause an insurance company to cancel a policy.

The Court: Well, it is an element.

Mr. Detweiler: They cancel a policy after a loss when they find that their assured has got a criminal record or—

Mr. Adler: Oh, nonsense.

Mr. Detweiler: Oh, yes; they do.

The Court: Well, what we are saying is, Mr. Detweiler —I am speaking from my experience—if there were enough of these claims in succession, that they would cancel them out, so that this is only one step along the line in the event that there is a series of claims.

[fol. 143] I am just trying to point out that perhaps—

Mr. Detweiler: I wish I knew why Your Honor asked me that question.

The Court: The only reason I asked it is, it would seem to me on the surface of things, that there would be an adverse interest with regard to the insured himself, as opposed to anyone who is laying claim against his insurance carrier.

Mr. Detweiler: Oh, yes; but that is not—

The Court: But that may be too remote.

Mr. Detweiler: That is not the practice.

The Court: That may be too remote.

Mr. Detweiler: I can have a bad accident tomorrow, and they would pay the policy limits out. They wouldn't cancel me. I have been insured in the same company for years, and I hope I am a self-respecting citizen, but if they insure somebody they don't know, it is a little different.

The Court: You are a respectable citizen, Mr. Detweiler,—

Mr. Detweiler: Thank you, sir.

The Court: —and let me ask you: If you were in four serious accidents in the next four years, or the next four [fol. 144] months, I should say, and crack up and do a horrible amount of damages, and with the amount of coverage that I would be willing to "gamble" on that you carry, and as I carry and as a lot of people carry, I wouldn't be too sure that even with their past fine history with you and their past fine experience, that if you had four such, they would suddenly determine that Mr. Detweiler, while a respectable citizen, is now a bad risk: "Stop driving. Give up your license. In any event, if you are going to drive, you are going to do it without our backing you up."

Mr. Graf: I have seen that done, too.

Mr. Detweiler: Well, I say, in all due respect, that Your Honor is looking awfully hard for adverse interest, because—

The Court: Well, I am not looking. No, no, no, no.

Mr. Detweiler: Because that is a clearly remote situation.

The Court: I am posing this as a hypothetical. I have no idea, as I told you gentlemen when you came in, I have no idea what the law is on this subject. It is the first time the problem has confronted me. I fully intend to read the briefs that Mr. Adler has just submitted and which you say was submitted, and in thumbing through the file I think

I saw a brief in there submitted on your behalf on this question of the competence of Dutcher. I fully intend to read all those cases and I hope then to be in a little better position to make an enlightened ruling on his competence.

If I determine that he is incompetent as against the two [fol. 145] estates, we will then be confronted with a procedural problem as to how to arrive at this result, and in the meanwhile Mr. Adler will have to do a great deal of soul-searching in the event that I determine to let the testimony in.

Yes, suppose I did let the testimony in only as to the living witness.

Mr. Adler: Then I think that is—

The Court: Then I have no problem. Then it would only be a question of your waiting then until the defendants' case has been concluded to offer a point for binding instructions,—

Mr. Adler: That is correct, Your Honor.

The Court: —if that should be appropriate in light of whatever the testimony may reveal at that time.

Mr. Detweiler: Well, suppose the verdict goes against us—I got to think now.

The Court: We haven't reached the stage of verdict yet.

Mr. Detweiler: Suppose there is a verdict—

The Court: We haven't reached the stage of verdict. I am speaking now only of if I rule that Dutcher is incompetent as to the two estates, Mr. Adler really has no choice to make with regard to cross-examination, because the testimony presumably is not being admitted in his case; he, therefore, has no standing, certainly he would have no [fol. 146] good common sense to be doing any cross-examining as to testimony that is not going to be submitted to the jury for consideration in his case.

Mr. Detweiler: Then if I win in the remaining case, has he then the right to come in and start all over again and take a second bite at the apple?

The Court: I would assume so.

Mr. Detweiler: I don't think he does. I mean, the ruling is—

Mr. Adler: I will take that chance.

Mr. Detweiler: Under the ruling that all necessary parties must be joined.

Mr. Adler: I will take that chance.

The Court: But they are joined.

Mr. Detweiler: That means joined at trial,—

The Court: Yes.

Mr. Detweiler: —but bound by a decision.

The Court: Yes; but, Mr. Detweiler, have you ever known of a situation where defendants, even in a criminal case, who are required to be tried together, where a Court grants a motion for a directed verdict as to some and allows the testimony to go in as to others?

[fol. 147] Mr. Detweiler: Well, I don't think that is a parallel, for the reason that the Supreme Court—

The Court: Well, then let us eliminate it as a parallel. Let us look at this simply logically.

What useful function would it serve for me to permit this case to go to the jury and have the jury rule on it?

Mr. Detweiler: All I am saying is that the jury doesn't get to rule on it. The jury can answer interrogatories and then Your Honor can enter judgment according to the decision you reach as to competency, and in that way the thing is settled, once the law is settled.

But if you are going to let them out on a severance, then they get two bites at the apple, when the Supreme Court of Pennsylvania and the Circuit Court of this Circuit has said that all necessary parties must be joined, not merely to have them on the docket, but joined for trial, so that they will all be bound by the result—

Mr. Adler: Who said that?

Mr. Detweiler: —of the verdict.

Mr. Adler: Who said that and where is that said?

The Court: We go back again to the procedural problem, and if the procedural problem can be resolved, still preserving his right to non-activity—by "his" right I mean those attorneys representing the estates, if I were to rule that way—if the procedure that were agreed to would preserve to them their right of non-participation in the cross-examination of Dutcher, we will have arrived at the same result.

[fol. 148] No, we would not have, because the plaintiffs' position would be that if ultimately it should be ruled that Dutcher's testimony was competent, then I would want to level all the guns of cross-examination at him; I would not want to be bound by any decision arrived at by a jury without my having cross-examined this only witness.

Mr. Adler: Your Honor, could I indulge a little, whatever little—

The Court: Just a minute. Let me keep thinking a minute.

It is a gamble I would be willing to take, that even though the appellate court might rule eventually that—or even if I were to change my mind and determine that I had ruled incorrectly in determining that Dutcher was incompetent as to those estates, even though it would require another trial limited to the estates and without Harris, the living person, as a participant, though perhaps as a witness, I don't think there would be anything improper about that.

Mr. Detweiler: Every time I—

The Court: What you are saying, in effect, Mr. Detweiler—

Mr. Detweiler: Every time I defend a case, Your Honor, where there is some doubt in my mind as to whether a plaintiff has made out his case, I can't say to the judge, "Judge, I am going to rest. If the verdict is against me, then I want to put a defense on."

Mr. Adler: That is your decision.

[fol. 149] Mr. Detweiler: No—it is your decision to make.

The Court: No, no. What you are advancing to me, Mr. Detweiler—now you have departed from procedure—what

you are advancing to me is the proposition that if Dutcher's testimony is competent, it is competent as to all; it must be regarded as a unit.

This doesn't conform to what you said earlier, that if I were to determine that there is incompetence on the part of Dutcher as to the estates, I should submit it and just simply tell the jury, "Ignore it as to the two estates,"—

Mr. Detweiler: No; I didn't say that.

The Court: —because, in order to be consistent here, you would have to say, "Either you rule him competent as to all, because there is a living adverse party, or you rule him incompetent as to all."

Mr. Detweiler: No. I don't think I said that. I said: I think if he is competent as to Harris, and you think he is not competent as to the other two, you have no problem with the jury. You don't have to tell them to disregard it. Just let them decide the case—

The Court: No.

Mr. Detweiler: —and then act on a motion for binding instructions by the deceased plaintiffs.

The Court: After I have ruled the testimony incompetent as to the two estates.

Mr. Detweiler: Yes.

[fol. 150] The Court: All right.

Mr. Detweiler: Just ask the jury, ask the jury questions.

The Court: If I were to rule then on a point for binding instructions—

Mr. Detweiler: Well, you wouldn't even have to do that. When the jury comes in with its verdict, they are going to say: Cionci had permission from Dutcher or Cionci didn't have permission from Dutcher. If they say Cionci did not have permission from Dutcher, then you enter judgment in favor of the Lumbermens as to Harris, and if you still are of the mind that it is incompetent as to the estates, then you enter judgment in favor of the two estates and against Lumbermens.

Mr. Adler: That is ridiculous.

The Court: No. We won't say it is ridiculous, but—

Mr. Detweiler: Well, it is not ridiculous at all. It was exactly what Your Honor was saying a while ago.

The Court: No, no, except for the one problem: When you say, my granting a point for binding instructions, you mean I give it to the jury to determine whether as to the estates there was permission? I would have to, wouldn't I, in good conscience, if I had ruled that the testimony of Dutcher is incompetent as to the two estates and if that is the only testimony, wouldn't I have to rule, as a matter [fol. 151] of law, that the presumptions prevail? They are two different cases.

Mr. Detweiler: At the conclusion of my case, yes.

The Court: At the conclusion of your case.

Mr. Detweiler: But then at that point you can either—

The Court: But before we arrive at the conclusion of your case, I have the consideration here and now of ruling to what extent Dutcher may be permitted to speak.

There is a motion by Mr. Adler on behalf of the estate of John Lynch, which I understood to be joined in by Mr. Nelson—

Mr. Nelson: That is right.

Mr. Adler: You are right.

Mr. Nelson: On behalf of Nelson.

The Court: You represent Harris and Smith.

Mr. Nelson: Both of them.

Mr. Detweiler: Harris and the Smith estate.

Mr. Nelson: I represent Harris and the Smith estate, so I am joining Mr. Adler in that motion.

The Court: Joined in by Mr. Nelson, the attorney for [fol. 152] Sarah Smith, the administratrix of the estate of Thomas Smith.

Mr. Detweiler: But don't you see how that is going to create prejudice against me? If you direct a verdict in favor of those two plaintiffs, do you think they are going to consider the facts of the case? They are going to say, "We are not going to let Harris out in the cold."

The Court: Well, now, Mr. Detweiler, I don't know who created the prejudice in this case or which way the prejudice runs.

The fact remains we have three cases being tried together. Somebody tried to get them severed and was not successful, and I am now confronted with this. I am trying to make the best of what I have before me.

Mr. Adler: Maybe Mr. Detweiler—

The Court: Maybe you would now want to move.

Mr. Adler: Would like to move, yes.

The Court: Like to move for a severance.

Mr. Detweiler: No. I don't want to move for a severance.

The Court: But you certainly don't want to do that until I have determined this issue of competence, and I have no conception of what the ruling is going to be on competence, except that, certainly, from what you have all said, Dutcher can only be incompetent as to the two estates, and it seems [fol. 153] to me to be conceded that Dutcher is competent as against Harris, so that that is why we keep talking along this line of demarcation.

It is not to be taken as any indication that I have made up my mind,—

Mr. Detweiler: No, no. I didn't say that.

The Court: —because I haven't the slightest idea what these cases hold.

What I have been directing my attention to, actually, is a question of procedure, because the problem will not arise, procedurally, if I rule that his testimony is competent as to the estates. There is no problem.

Mr. Adler: That is right.

The Court: There is a problem on behalf of the estates trying to convince me that I have made a mistake legally, but that is a problem that can be resolved.

I am saying now, only assuming that I were to determine this procedural incompetence, the incompetence as to the two estates, I am trying to and what I have been directing all of my remarks to here has been toward the procedure by which we can best effectuate such a ruling.

One way would be, of course, to let it go to the jury. Mr. Adler and Mr. Nelson, having been told that I will not permit the jury to consider it, would, of course, not participate, but we would have the same result that you were so concerned about.

Having ruled that way, and their not having participated, and my having instructed the members of the jury that, "You must return a verdict for the estates, because there [fol. 154] is no testimony now for you to consider," if you were to take an appeal then from my ruling as to Dutcher's incompetence and convince the Court of Appeals that I was wrong, wouldn't you then be confronted with the requirement for another trial?

Mr. Detweiler: Well, I certainly would be confronted with the demand for another trial, but I don't think that the demanding parties would be entitled to it.

Mr. Adler: Well, we can cross it. I am willing to take that risk.

The Court: Well, why not? I don't understand that.

Mr. Detweiler: Well, because you speak about obtaining a verdict from the jury for or against one of the parties. I say the way to handle this, of all cases, is merely to ask them to answer interrogatories. They won't have to know who is going to win. It may surprise them, though, if you told them later that one plaintiff lost and the other plaintiffs won, but they won't have to know that.

The Court: Well, but, Mr. Detweiler, that does not solve the problem. Assuming, which we are always assuming in these conversations, assuming a ruling that Dutcher's testimony is incompetent as to the two estates, obviously the estates will not question, because I have ruled that his testimony may not be considered in their cases; consequently they will not participate.

Even if the matter is submitted to the jury to answering interrogatories, "Did he have permission?" and the jury says, "Yes," or, "No; he did not have permission from [fol. 155] Dutcher," and then Mr. Adler says, if you want to get the Court of Appeals to reverse me or get me to re-

verse myself, "Well, I haven't had my day in court; I was proceeding on the assumption that the testimony would not be admissible against my clients in accordance with your ruling."

Mr. Detweiler: But why face all this, Your Honor? Why don't you just reserve ruling?

The Court: Until when?

Mr. Detweiler: And let Dutcher testify and let them cross-examine him, and if it turns out that they shouldn't—that he should not have been permitted to testify against the decedents' estates, then judgment can be entered for them.

The Court: Are you willing to stipulate that they will not be prejudiced in this position by anything that is brought out on cross-examination?

Mr. Detweiler: No.

The Court: Of course not; and it is for that reason that if I should be convinced that the law is that Dutcher is incompetent, it will not be handled in that fashion; however, I don't know what fashion it will be handled, because I am, very frankly, puzzled, and apparently all of you experienced attorneys are also puzzled.

Mr. Nelson: Some of the judges were, too, sir.

[fol. 156] Mr. Adler: I am sure the only one who feels no doubt about it at all is myself.

Mr. Detweiler: Well, I don't think Judge Van Dusen has any doubts.

The Court: I will say that I had no doubts about this case, either, until it was presented to me, and so I, therefore, assume that there are a number of judges who have no doubts about it, because they don't have the problem.

* * * * * * *

Mr. Detweiler: Oh, by the way, there is one piece of unfinished business, and that is my right to call Pirrung, the claims manager, who is not named on the pre-trial memorandum.

The Court: All right; now we will hear what this was all about.

Mr. Detweiler: Well, it is fairly—

The Court: I had no conception what you were talking about when you struck me in the corridor with a proposition.

Mr. Detweiler: It is fairly simple. At the time there was a motion before Judge Van Dusen to sever, he realized that this question of the competency of Dutcher would arise, and I argued to him that Dutcher had no interest, because he had available to him coverage in the policy, and Judge Van Dusen said, "I don't have that before me." [fol. 157] I said, "Then I will submit an affidavit to Your Honor."

So I supplied an affidavit by L. C. Pirrung claims manager of the Lumbermens Mutual Casualty Company, which is in the records of the file here, in which he stated that the Lumbermens acknowledge their responsibility to Dutcher to pay any judgment against him up to the limits of the policy and were affording him a defense in the two Delaware County actions in which he was named as a defendant, and that was filed with Judge Van Dusen.

Now, I consider it important, because it does establish his lack of interest, at least to that extent, but he has the coverage of the policy available to him.

And the case then came on for trial Tuesday, two weeks prior to this Tuesday, before Judge Wood, and I told Mr. Adler I would like to add him, use him as a witness, but I said I hadn't named him in my pre-trial conference memorandum.

Mr. Adler said, "But I think I have a witness or two I want to add to my pre-trial memorandum."

And I said, "Well, let me know who they are, and suppose we agree that yours and mine will be added or used as witnesses."

And he said, "All right; I will let you know."

Wednesday the same thing happened. Thursday the same thing happened. And some time on Thursday, with the jury sworn, Judge Wood declared a mistrial, and I asked Mr. Adler again, and he said he didn't have the names of his witnesses yet.

So I promptly filed a motion to amend my pretrial conference, pretrial conference memorandum, and it was argued before Judge Van Dusen, I think last Friday, and I stated to Judge Van Dusen what I have now stated to Your Honor, and he made a ruling, which is in writing, [fol. 158] that if the case was not reached by December 14, then I could amend my pre-trial memorandum to include this man's name, and Mr. Adler would have until January 4 to take his deposition and, if not, I could not amend my pre-trial memorandum, but that was left to the trial judge, whether I could call this witness.

I said that I would confine his testimony to what was contained in that affidavit which had been filed back in October and that I would give Mr. Adler an opportunity to take his deposition Monday morning, this week, if he wanted to, but he declined, and I would like to call that witness.

The Court: Let me get that again: The purpose of his testimony is simply to testify that there is available to Dutcher the limits of the policy for the Delaware County cases?

Mr. Detweiler: For any judgment obtained against him as a result of this accident.

The Court: Including this court?

Mr. Detweiler: No, not this. He is not a party to this. There can't be a judgment against him in this trespass action in the U. S. District Court, but in any action in which he is a party.

The Court: That only goes to the question of adverse interest.

Mr. Detweiler: That is right.

[fol. 159] The Court: I am the one who has to rule on adverse interest.

Mr. Detweiler: That is correct, Your Honor.

The Court: So why should I permit him to testify?

Mr. Detweiler: So that you could have testimony on which to base your decision.

The Court: But not before the jury. What has the jury got to do with that? I either rule that he is competent or incompetent. The jury doesn't have to hear that.

Mr. Detweiler: If you accept his affidavit, I won't call him.

The Court: Do you have any objection to my considering the affidavit in determining whether there is any interest, or do you want him to testify at a side trial out of the presence of the jury so that I may determine the issue of competence?

Mr. Adler: May I take a fast look at the affidavit?

The Court: You may.

Mr. Adler: My well-organized friend here has been—can put his fingers on these things a lot quicker than I can.

Mr. Nelson: I don't know.

Mr. Adler: Do you have a copy of the affidavit?

[fol. 160] Mr. Nelson: It is in the file. It is in the clerk's file.

The Court: See, what concerns me, Mr. Detweiler, is that, assume that the company were to agree with him that, "We will pay any judgment that is obtained against you."

Does this remove the possible adverse interest?

Would there then be required a trial to determine on what basis the company agreed to pay any judgment obtained against him?

Was it in order to avoid liability on the part of the company on the trial that took place down here, just as you suggested that the settlement in the other case was in order to create a claim against Liberty Mutual?

Mr. Detweiler: Oh, no.

The Court: How far do I go in determining this question of interest?

Mr. Detweiler: No—the only reason I want this accepted is, and I was thinking of a situation where in the case out in Delaware County, if there could conceivably be a verdict against both Dutcher and Cionci, Dutcher would have no interest in whether Cionci was covered by the policy that covered Dutcher, and once the policy was paid on Dutcher's

behalf, it would be exhausted, because the policy doesn't provide X dollars of coverage for you, the owner, and Y dollars or 2x for the driver, you see; so that it wouldn't make any difference to him whether Cionci has coverage or not, as long as he had it.

The Court: But suppose, conversely, the coverage for Cionci would eliminate, would use up the coverage of the policy.

[fol. 161] Is the company statement here simply a gratuitous offer to him that, "Don't worry; we will take care of any judgment against you, i.e., notwithstanding that it may be used up in any other case?"

Mr. Detweiler: Well, no, Your Honor. I—

The Court: Let us forget about it. Let us forget about it.

I am asking you only in this sense: How far do I have to go to determine what kind of an interest is an adverse interest? And this again leads me into the pathways of the cases that you gentlemen have both cited in your briefs.

Mr. Adler: Could I ask Mr. Detweiler—

The Court: Maybe I will have an answer by the time we get to court.

Mr. Adler: May I ask Mr. Detweiler a simple question of using figures, for example?

Suppose that Mr. Dutcher has a fifty to a hundred policy and that the jury here finds that Cionci is an assured in the policy, and that $50,000 should be paid to the Lynch estate.

Has not the coverage that Lynch—that Dutcher has been reduced by $50,000?

Mr. Detweiler: No doubt about it.

Mr. Adler: That is my point. That is my entire point.

Mr. Detweiler: No doubt about it.

[fol. 162] Mr. Adler: And that any verdict in excess of that fifty thousand is going to come out of Dutcher's pocket.

Mr. Detweiler: Then if there are two verdicts out in Delaware County of $500,000—or, well, let us say $60,000, then he will be short $10,000.

Mr. Adler: That is right.

Mr. Detweiler: No doubt about that.

The Court: No, no, no, no. Then what does Mr. Pirrung's affidavit mean then, that, "The company will cover you for any judgment against you up to the limits of the policy?"

Mr. Detweiler: But not if it is already paid out for somebody else.

The Court: Well, then you have still an adverse interest. What good is it going to do?

Then, with that understanding, perhaps, Mr. Adler—I haven't found the affidavit yet. I am looking for it. Have you found the affidavit?

Mr. Adler: No. We can't find it. I—

The Court: With that understanding, perhaps you will agree that I consider the affidavit as well, because with that reservation—this is the very thing I was concerned about—unless you had told me there was that reservation, Mr. Detweiler, then I would have to say that if that is the company's position, then I must ask the suspicious ques-
[fol. 163] tion: Are they volunteering something more than they would be required—

Mr. Detweiler: No, no.

The Court: —to pay under the policy?

Mr. Detweiler: No, no. If they pay out—

The Court: So that if it doesn't change that—

Mr. Detweiler: If they pay out—if they paid out a hundred thousand dollars, if that were the policy limits, in payments of judgments against Cionci, and there were more—

The Court: Dutcher is out.

Mr. Detweiler: —against Dutcher, he wouldn't get it.

The Court: All right; so then there is really no need for me to consider the affidavit, is there, because the statement you just made is the understanding that I had from the outset, namely, that there is some unspecified limit to this policy; it matters not, in so far as the company is concerned, whether it is for judgments against the named assured or for drivers driving with permission of the named

assured: When the policy limits have been reached, Mr. Dutcher is on his own if there are any other judgments over and above that amount.

Mr. Detweiler: That is right.

[fol. 164] The Court: Therefore, Mr. Dutcher's interest might be adversely affected by any payments on behalf of the driver, Cionci, if it is found that Cionci was driving with Dutcher's permission.

Mr. Detweiler: That is correct.

The Court: So that I have the factual situation, then, before me, and the affidavit or his testimony would neither add anything or detract from the understanding that I earlier had.

Mr. Detweiler: Well, if you will accept as part of the record on which you make a—make your finding of competency, if you will accept Pirrung's affidavit, I don't desire to call him.

The Court: All right. Do you have the affidavit?

Mr. Detweiler: I have it.

The Court: Do you have a copy of it?

Mr. Nelson: I don't have it right here, but I am sure it is—

Mr. Detweiler: Here it is.

The Court: Did you have it filed? Is it in the—

Mr. Detweiler: Yes, I am sure my original is filed.

The Court: Well, the file is here. It is probably in here.

[fol. 165] (The Court read the affidavit of L. C. Pirrung, aloud.)

The Court: Note in the record that I read the affidavit of L. C. Pirrung contained in the record.

The affidavit will be considered, together with your statement, Mr. Detweiler, that this affidavit must be considered together with your statement that the limits of the policy would include within those limits any payment that might be made under this policy for any driver driving with the permission of the assured, namely, in this case, should it be determined that Cionci was driving with the permission

of Dutcher, it would include that, and I shall take this affidavit and that statement into account in determining the question of competence of Mr. Dutcher.

Mr. Adler: Your Honor, I have just one reservation. I don't know what that—could I—could I look and see what that last statement was?

Mr. Detweiler: I will tell you what it is.

You argued before Judge Van Dusen that one reason he had an interest contrary to Cionci was that he, as the owner might want to sue Cionci for the damage done to his car and, therefore, he would want—he would be interested in whether Cionci had coverage, and I pointed out in that the damage to the assured's own car is—

Mr. Adler: Not covered in the liability policy.

Mr. Detweiler: That is right.

Mr. Adler: Yes, Mr. Graf raises a thing which I think Mr. Detweiler—actually, there is no more than—well, there [fol. 166] was an answer filed rather than an appearance, so I don't know that that makes any difference.

Mr. Detweiler: Answer to what?

Mr. Adler: The law firm in—in Delaware County filed an answer, not just an appearance. It doesn't make any difference.

The Court: Well, that has nothing to do with the question. The question, very simply—

Mr. Adler: I don't think it really changes anything.

Mr. Detweiler: Well, they are defending four of them.

The Court: The record that is being made here is one for the consideration of myself and any other reviewing courts to determine whether I have reached a proper conclusion—

Mr. Adler: That is right.

The Court: —as to the question of competence and whether the interests are adverse; so I don't think that there should be really any objection on that score.

Mr. Adler: No, no.

The Court: Is there any objection?

Mr. Adler: No, no.

[fol. 167] The Court: There is no objection to my considering that affidavit in conjunction with the statement made by Mr. Detweiler.

All right; now, gentlemen, I guess we are excused.

(This case adjourned at 6:07 o'clock p. m. to December 14, 1962, at 10:00 o'clock a. m.; court in recess awaiting the return of a jury.)

Philadelphia, Pa., December 14, 1962.

* * * * * * *

The Court: May I see you gentlemen at side bar, please?

(At side bar:)

The Court: I am going to rule that Mr. Dutcher is incompetent to testify as to the estate of Lynch and as to the estate of Smith.

In view of that ruling, I don't know whether you wish to proceed in this order with Mr. Harris as the witness. Frankly, I can see no difference. It really makes no difference whatsoever what the order is.

Mr. Detweiler: Well, I should think it would make a difference, Your Honor, because his case is before the Court, and if I didn't proceed further, I don't know what—what the disposition of his case would be.

[fol. 168] Don't you think we ought to go to trial?

The Court: No—I am speaking here of order of proof. I am speaking of order of proof.

Mr. Detweiler: Oh, I understand.

The Court: Remember, Mr. Harris was on the stand. A question was raised as to whether his testimony would have any relevance before Mr. Dutcher testified, and in view of my ruling I see no distinction. It will still have significance, of course, in Mr. Harris' case.

All I am saying is that it matters not whether you put Mr. Harris on first or after Mr. Dutcher.

Mr. Detweiler: I am sorry.

The Court: It is unimportant.

Mr. Detweiler: Yes. I understand now. I thought you were talking about dropping the case.

The Court: Oh, no, no, no, no.

You will recall yesterday Mr. Adler raised a question of order of proof, in effect.

Mr. Detweiler: Yes. I recall it.

Now, if we go to speeches, may I ask that they be transcribed?

The Court: Certainly.

Mr. Detweiler: And I should like to make an offer at side bar of Paragraph 5 of the plaintiff's complaint.

[fol. 169] Mr. Adler: I didn't hear Mr. Detweiler. Of what? On what?

(Record read.)

Mr. Adler: Of whose complaint?

Mr. Detweiler: Paragraph 6 of the amended complaint in this case.

Mr. Adler: Oh, O. K.

The Court: Of whose amended complaint?

Mr. Detweiler: Of plaintiff's amended complaint.

The Court: Is there a plural plaintiffs' amended complaint?

Mr. Detweiler: No, sir.

The Court: Well, this is what Mr. Adler is asking and I am asking also.

Mr. Detweiler: This is for the purposes of establishing lack of interest which reads as follows:

"On January 17, 1958, plaintiff's decedent was riding as a passenger in a borrowed motor vehicle"—

The Court: Plaintiff's decedent. I am trying to get this. Is this in Mr. Lynch's—

Mr. Detweiler: "Plaintiff's" is Mr. Lynch.

[fol. 170] The Court: All right.

Mr. Detweiler: "—was riding as a passenger in a borrowed motor vehicle insured by defendant which was in-

volved in an accident on Bryn Mawr Avenue, Radnor Township, Pennsylvania, as a result of which the said John R. Lynch sustained injuries from which he subsequently died."

That is for the purpose of showing that there is a contention by the plaintiff not that the car was being driven on the business of Dutcher, but was a borrowed car.

Mr. Adler: Well, what has that got to do with it?

Mr. Detweiler: Well, I told you what I thought it had to do with it.

Mr. Adler: That is—that is our case. We didn't—we didn't sue Dutcher.

The Court: Well, just a minute.

Mr. Adler: All right, sir.

The Court: I don't know yet what this is. You just are reading it into the record?

Mr. Detweiler: The purpose of it is to establish, Your Honor, that there is no contention by this plaintiff that Dutcher would be liable for this accident, because of the allegation that this was a borrowed car.

The Court: Oh, perhaps I ought to clarify my ruling. Because we were doing this at side bar, I didn't go into any [fol. 171] extended discussion. This is going to be most difficult. Let us take a minute.

(To the jury:) Members of the jury, we have several things that must be taken care of here.

I am going to ask you to step out for a few minutes and wait outside in the jury waiting room. Don't stray away, because it may not take too long, but I didn't want you just to sit there while we strain here to keep our voices down. We have some discussion on some legal points that must be clarified.

(Jury out at 10:24 o'clock a. m.)

The Court: I think I had better go into some explanation of my ruling and have it on the record, and perhaps I should have done it before you made your offer. It has

nothing to do with this, but your position should be made clear as you are putting it in the record, and I should make my ruling clear on the record, and so on.

All right, gentlemen, you can go down into open court so that we can be a little more relaxed here.

Now that the jury is out, I would like to give a few words of explanation for the ruling which I announced to you gentlemen at side bar concerning Mr. Dutcher's competence as a witness.

I have Judge Van Dusen's memorandum opinion and order on a motion for severance before me and have studied it very carefully. There is no specific ruling by Judge Van Dusen on the question of Mr. Dutcher's competence, but there is a very strong expression of opinion by Judge Van Dusen that Mr. Dutcher would be a competent witness in this trial and, of course, I am very much persuaded by the expression of opinion by Judge Van Dusen [fol. 172] and would be very much inclined to follow his expression of opinion, particularly in view of the shortage of time to make an adequate study of this problem, with all of the research that goes with it.

However, I think that the different facts that I am considering from those which, apparently, Judge Van Dusen was considering, perhaps justifies rather quickly the different position that I am taking than Judge Van Dusen indicated ought to be taken.

On Page 6 of Judge Van Dusen's opinion he referred to the affidavit of Mr. Pirrung of the defendant insurance company indicating:

"The insurance company has obligated itself to defend Dutcher in the pending suits against him and to pay any obligation he incurs in those suits up to the policy limit. Therefore, a determination as to whether the insurance company is also obligated to the Cionci estate or others is not adverse to his position."

That is the extent of what I am reading from Judge Van Dusen's opinion.

I think that recitation does not take into account all of the facts which were presented to me in chambers, primarily the fact that the insurance company's offer or the insurance company's indication of an obligation to defend Dutcher in the pending suits and to pay any obligations he incurs in those suits up to the policy limits includes the understanding that whatever payments may have to be made in any suits against Cionci would constitute a reduction of the policy limits, or, stated in another way, whatever payments are made for any claims against the Cionci estate arising out of the accident involving the car borrowed by Cionci from Dutcher would be chargeable against these limits of the policy.

[fol. 173] With that additional factor taken into account, it is my considered opinion that there is an obvious adverse interest on the part of Dutcher to the representatives, to the successors of the interests of Lynch, the passenger in the borrowed automobile, and to the interests of the successors in interest of Smith, the driver of the vehicle with which the borrowed vehicle came into collision, and that is the basis for my ruling on the competence.

To the extent of any payment made on behalf of the Cionci estate under this policy, it will reduce the amount of insurance coverage available for the protection of Mr. Dutcher in the other suits pending against him.

Mr. Detweiler: Now may I make an offer of proof, Your Honor?

The Court: Yes.

Mr. Detweiler: In view of the fact that Your Honor has ruled on this before I have actually put Mr. Dutcher on the stand, I believe I am entitled to put anything in the record which in my opinion establishes that there is not an adverse interest.

The Court: Positively. If there is any question about the procedure here on my ruling on this at this stage, I must confess that in the two hours that we spent in chambers we discussed a number of procedures. I know that we

ultimately ended up discussing primarily the problem of Mr. Dutcher's competence, and it is, therefore, for that reason that I am making the ruling at this stage in order that you may be guided in the presentation of your defense.

[fol. 174] Mr. Detweiler: Now, I don't think it is necessary, Your Honor, for me to repeat what I said at side bar, that I offer Paragraph 6 of the amended complaint in the case now before the Court, and I read it at that time, so I know the court reporter has it on his notes.

And I offer also in evidence the second defense to that amended complaint which I won't read, because it deals with all the paragraphs of the complaint, but it denies that paragraph, and it also—denies the paragraph of the complaint that I offered.

And I also offer in evidence the fourth defense filed by the defendant, Lumbermens Mutual Casualty Company, which reads:

"At the time and place of the accident, the automobile was being driven without the permission of the owner."

I omit what follows, because I have admitted in the trial of the case that Cionci was driving.

The Court: Before the jury comes back what is the order of procedure from here on, Mr. Detweiler? Do you propose to continue with Mr. Harris, who was sworn yesterday?

Mr. Detweiler: Yes.

The Court: All right; then you just be prepared to proceed.

Also I will give you an opportunity now to suggest some better procedure, that when Mr. Dutcher does testify I will simply instruct the jury at that time as to the limits of his competence to testify.

Mr. Detweiler: With an exception to me, Your Honor, in view of the—

[fol. 175] The Court: Of course; as a matter of fact, you may make your objection at that time to my ruling, even in the presence of the jury, and there will be no question.

Mr. Detweiler: The objection, Your Honor, to Your Honor charging the jury that it should not be considered with respect to the two decedents who are plaintiffs.

The Court: Well, make your objection, whatever it may be. If you have some other method of procedure to suggest, I would be very glad to consider it.

Mr. Detweiler: No; I am just going to put Harris on and then Dutcher, and Your Honor will make the ruling and, I presume, state in the presence of the jury that it is not to be applied to those two, and I will simply ask an exception to it.

The Court: Yes; all right.

Mr. Adler: May it please the Court, a matter has arose that Mr. Nelson has consulted with me and, frankly, to some extent I must lean on for guidance of the Court, and that has nothing to do with the merits of this case.

Mr. Nelson now finds himself in a conflict because of the fact that he represents a client who—to whom the witness will be incompetent and a client to whom the witness is competent.

He then asked for a re-alignment of counsel, in view of the fact that Provident—he represents two clients and Provident Tradesmens has two counsel, and he asked for a re-alignment of counsel so that Mr. Graf would remain as counsel for Provident, he would remain as counsel for Smith, and I would take over the defense of Harris.

[fol. 176] This I would be willing to do, provided there was an agreement of all counsel that in no way is this prejudicial to any party or in no way could I be construed as enveloping any conflict of interest.

The—the thing that bothers Mr. Nelson particularly is that he came into the case so late in the procedure, he was just joined a—a month ago, and he was relying upon me to carry the laboring oar, but I am, frankly—this is the first time I have ever been put in this position, and I am without—I am not sure that I can do it or whether I should do it, except that he feels that justice would not be served for Mr. Harris unless I did do it.

Is that it?

Mr. Nelson: That is substantially correct, sir.

Mr. Adler: This is a most peculiar position.

Mr. Nelson: That is my position, and I am asking the Court for assistance.

Mr. Detweiler: Well, I certainly won't—

The Court: I would just like to write, before anybody says anything, precisely what Mr. Detweiler is going to say, down on here, and then compare it with what he, in fact, does say. You have now created a situation.

All right, Mr. Detweiler, you say now what I fully expect you to say and which you should say.

Mr. Adler: Well, if he objects, I will not do it.

The Court: Well, you have your problem there. Now, [fol. 177] whether that problem is one that Mr. Nelson will have to wrestle with with his clients—obviously, Mr. Detweiler will object and should object.

You are creating here or presenting to the Court the seeds of mistrial, and in view of the ruling which I made, why shouldn't Mr. Detweiler take advantage of it, if that is a problem?

Now, I don't know whether it is a problem or is not a problem, but you will have to resolve it, and you can't ask for the assistance or you can't ask for the agreement of opposing counsel on that score,—

Mr. Adler: If under—

The Court: —and I don't think you should put the Court in the position of trying to resolve that problem for you.

Mr. Adler: I am sorry. I didn't intend to put the Court in the position. I was assuming that all counsel would agree. I—I—

The Court: I think it is a very wrong assumption to make at this juncture of the case.

Mr. Adler: Well, I didn't—I—I should say I assumed that they would do it. I would not do—accept re-alignment of counsel in the absence of agreement of all counsel.

The Court: The problem hasn't been resolved, Mr. Adler.

[fol. 178] Mr. Adler: Well, Mr. Nelson—Mr. Nelson will, of course, carry on. I can't accept re-alignment of counsel in any way that is going to prejudice my client for whom I came to the court and, therefore, I will not accept re-alignment of counsel.

The Court: Well, then I should have to rule at this stage that if Mr. Nelson undertakes to do anything to question these witnesses, that he shall have to indicate clearly and precisely on whose behalf he is asking those questions.

I am not sure that that is a proper method of procedure, but that is what I am suggesting, that it be made abundantly clear in what role he is asking a particular question—or, not a particular question, but in what role he is asking a line of questions of a particular witness, so that at least we can see whether the situation may be resolved in that fashion. I don't know of any other way to approach the problem.

Bring the jury in.

(Jury in at 10:37 o'clock a. m.)

* * * * * * * *

JOHN LANDIS HARRIS, resumed.

The Court: You have been sworn, Mr. Harris.

The Witness: Yes.

The Court: You may be seated.

[fol. 179] Mr. Adler: May it please the Court, do I understand that my objection to this witness, so far as the estate of Lynch, has been sustained by the Court?

The Court: No, not quite, Mr. Adler. I don't know that there is any problem as to this witness' testimony. In view of the instructions which I will have to give to the jury at a later time, there will be no significance.

Perhaps, I think you will have to make an objection when a specific question is asked, at which time I shall have to rule in light of the situation then existing.

I am trying to anticipate just exactly what might happen, but, as I view it, perhaps I might have to overrule your objections.

Direct examination.

By Mr. Detweiler:

Q. Mr. Harris, where do you live?
A. Bryn Mawr.
Q. Bryn Mawr?
A. Yes.
Q. And how long have you lived there?
A. Well, about forty, fifty years, I think it is.
Q. Fifty years?
A. Forty, fifty years.
Q. On the 17th of January, 1958, were you involved in an accident?
A. Yes.
Q. And you were then riding as a passenger in a car in which Mr. Lynch and Mr. Cionci were also occupants?
A. Yes.

[fol. 180] The Court: Will you keep your voice up,—
The Witness: Oh.
The Court: —please, Mr. Harris.
The Witness: Yes.

By Mr. Detweiler:

Q. Where had you entered that car?

Mr. Adler: Your Honor, I object, as irrelevant and immaterial, and this witness is also incompetent as the—as to the estate of Lynch, in view of the actions in Delaware County.
The Court: I will overrule the objection.
Mr. Nelson: Same objection, if Your Honor please, on the part of the estate of Smith.
The Court: I overrule the objection.

By Mr. Detweiler:

Q. Where had you entered that car, Mr. Harris?

A. It was on a main street.

Q. Main street of what town?

A. Media.

Q. Media; where had you been just before you got in the car?

A. I was in Media Courthouse.

[fol. 181] Q. Media Courthouse; and how far from the courthouse was it that you entered the car?

A. I was on the main street near the trolley car,—

Mr. Adler: Well, Your Honor—

The Witness: —near the trolley car that runs there.

Mr. Adler: Well, Your Honor—Your Honor, in order to avoid constant interruption as to this particular line of questioning, may I have a continuing exception?

The Court: Yes, your objection and—

Mr. Nelson: Same objection.

The Court: —I assume Mr. Nelson's objection on behalf of the Smith estate is as to all the testimony of Mr. Harris relating to when and where he got into this automobile, and what happened thereafter, I assume, for the purposes of this suit, and I have overruled your objection, and your objection is on the ground of irrelevance in your particular cases.

Mr. Adler: And, Your Honor, and under the Dead Man's Rule in the estate of Lynch.

My objections were twofold, Your Honor. I have contended, Your Honor, that this witness is incompetent as to Lynch.

The Court: I am not sure that you have demonstrated any adverse interest on the part of this witness to the estate.

[fol. 182] Mr. Adler: May I point it out, Your Honor.

Mr. Detweiler: Well, obviously, Your Honor—

Mr. Adler: I—I refer Your Honor to the—to the—to the captions of the Delaware County cases.

Mr. Detweiler: Obviously, Your Honor, the estate of Lynch and this witness have the same interest with—with regard to this issue.

Mr. Adler: The record of this case, Your Honor—

The Court: All right; you have made it—

Mr. Adler: Yes.

The Court: You have made clear on the record that that is an additional basis for your objection.

Mr. Adler: Yes, Your Honor.

The Court: I have overruled the objection.

Mr. Nelson: And I join in that.

The Court: And likewise Mr. Nelson on behalf of the estate of Smith, I overrule the objection.

Mr. Detweiler: Do we have the question unanswered?

(Last question and answer read.)

[fol. 183] By Mr. Detweiler:

Q. And how far was it from the courthouse where you were waiting?

A. I don't know. It was just along the main street.

Q. A block or two from the courthouse?

A. Oh, about a block or so.

Q. Now, you know Mr.—or, knew Mr. Lynch and Mr. Cionci, didn't you?

A. I knew Mr. Cionci, but I didn't know Mr. Lynch.

Q. Had you never seen Mr. Lynch before?

A. No.

Q. How long had you known Mr. Cionci?

A. Oh, some time.

Q. And where did he live?

A. Bryn Mawr.

Q. And had he lived there as long as you knew him?

A. Yes, as far as I know.

Q. About how many years was that?

A. Oh, I don't know how many years.

Mr. Adler: Your Honor, I am going to object to this again—this is a different range of questioning—as immaterial and irrelevant as to the estate of Lynch.

The Court: I overrule the objection.

Mr. Nelson: The same.

By Mr. Detweiler:

Q. Now, did they invite you to get in or did you hail them?

[fol. 184] A. No. I—

* * * * * * *

By Mr. Detweiler:

Q. Did they stop and ask you to get in or did you wave to them and ask them for a ride?

A. No; I didn't ask them for a ride. They stopped and asked me where I was going.

Q. All right; what did you tell them?

A. I was going to Bryn Mawr,—

Q. Then they invited you into the car?

A. —and Cionci say, "I am going"—

Q. Then they invited you into the car, did they?

A. Yes.

Q. And you rode with them until this accident happened?

A. Oh, yes.

Q. Do you remember what route you took?

A. No. I don't know what it was.

Q. Do you know what street you were on when the accident happened?

A. Bryn Mawr Avenue.

Q. And do you recall that it happened near or at the intersection of Bryn Mawr Avenue and Castlefinn Lane?

A. Yes.

Q. You didn't pass through Ardmore on this trip, did you?

A. No.

Mr. Adler: Your Honor, I object, again, as immaterial and irrelevant.

[fol. 185] The Court: Overruled.

Mr. Detweiler: Cross-examine.

Cross examination.

By Mr. Nelson:

Q. Mr. Harris, you re—

Mr. Nelson: If Your Honor please, in these questions that I ask now, it is in the capacity of representing John Landis Harris.

The Court: You are questioning him as his attorney?

Mr. Nelson: Yes, sir.

The Court: All right.

Mr. Detweiler: I don't think counsel has a right to do that. He represents two plaintiffs on this record.

Mr. Nelson: If Your Honor please, I am going to be put in the anomalous position of then again asking for a severance for this trial.

Mr. Detweiler: Then you better ask for a continuance of the entire case,—

Mr. Adler: Your Honor, I would object to that.

Mr. Detweiler: —and then start it over with some sepa-

[fol. 186] rate counsel representing these two plaintiffs who Mr. Nelson represents who have interests that possibly conflict with each other.

Mr. Adler: Your Honor—

The Court: We will proceed. I am going to permit Mr. Nelson to do this over Mr. Detweiler's objection.

Mr. Nelson: May I proceed?

The Court: Yes. I am permitting you to question as the attorney for Mr. Harris and not as the attorney for the Smith estate.

By Mr. Nelson:

Q. Mr. Harris, do you recall which man invited you to get into the automobile?

Mr. Adler: Your Honor, of course, I still have an objection as to any line of questioning on this, and also as immaterial and irrelevant, and as to the estate of Lynch.

The Court: I will overrule it.

By Mr. Nelson:

Q. Did you hear the question, Mr. Harris?

A. No; I didn't.

Q. You referred to "they." Now I am asking you which man invited you to get into the automobile?

A. Cionci.

[fol. 187] Q. I beg your pardon?

A. Cionci.

Mr. Nelson: That is all.

Thank you.

Mr. Detweiler: That is all,—thank you, Mr. Harris—unless you have any questions, Mr. Adler.

Mr. Adler: I have no—I have no questions at all.

* * * * * * *

Edward S. Dutcher, having been duly sworn, was examined and testified as follows:

Mr. Adler: Your Honor, in view of the ruling, may I—I—I gather that I don't have to ask for an offer of proof and for a precise—

The Court: No; I don't think it is necessary to ask for another offer of proof. I think that at this stage you can make your formal objection, on which I will rule, and then we will give appropriate instructions to the jury.

Mr. Adler: Your Honor, on behalf of my client, the estate of Lynch, I object to this witness as incompetent to testify against the estate of Lynch.

Mr. Nelson: And the same as to the estate of Smith, if Your Honor please, sir.

[fol. 188] The Court: And you are making this objection, I take it, in your role as attorney for the estate of Smith, Mr. Nelson?

Mr. Adler: That is right.

Mr. Nelson: Yes, sir.

The Court: All right.

I sustain the objection as to the estate of Lynch and as to the estate of Smith, and I will instruct the members of the jury that testimony you are about to hear from this witness, Mr. Dutcher, you may only consider in that part of the case in which Mr. Harris is suing Lumbermens Mutual Casualty Company and the administrator of Donald Cionci.

You may not consider any of the testimony that Mr. Dutcher gives in so far as it deals with Provident Tradesmens Bank and Trust Company, the administrator of the estate of John Lynch.

You may not consider this testimony in so far as the claim of Sarah B. Smith, the administratrix of the estate of Thomas W. Smith, deceased.

This is because there is a statute in Pennsylvania which renders a surviving person incompetent to testify as to transactions involving a deceased person if the surviving person's interest is adverse to the surviving representative or to the representative of the deceased person; and I have ruled that Mr. Dutcher has an interest which is adverse in these proceedings to the interests of the estate of Lynch and the estate of Smith.

It is going to be a difficult thing for you to do, but you are going to have to try to consider Mr. Dutcher's testimony only as it deals with the claim of John Landis Harris.

[fol. 189] Mr. Detweiler: Your Honor made mention of the fact that—of what you said to the effect that Mr. Harris had an action against the Lumbermens Mutual Casualty Company. There is no evidence of that.

Mr. Adler: What is this?

The Court: Isn't he a plaintiff in these proceedings, in this suit?

Mr. Detweiler: Oh, in this court? I thought you meant the Delaware County suits, sir.

The Court: I am only referring to the lawsuit which is on trial before this jury;—

Mr. Detweiler: I see.

The Court: —and I am speaking only to the jury to try to explain to them the extent to which they may consider Mr. Dutcher's testimony.

You may only consider it in the suit which is being tried before you by Mr. Harris against Lumbermens and the estate of Cionci, not in the other two claims that are being presented on behalf of the estate of Lynch and the estate of Smith.

Mr. Detweiler: And I take it I have an exception to your ruling and to what you have just told the jury, sir.

The Court: Well, as far as what I have just told the jury, I am afraid I am going to have to ask you at the appropriate time, just as you would object to a charge, [fol. 190] to tell me how I should have said it, but you have an exception to the ruling.

Direct examination.

By Mr. Detweiler:

Q. Mr. Dutcher, where do you live?

A. I live in Radnor.

Q. How long have you lived there?

A. I have lived there approximately two months.

Q. Where did you live before that?

A. I lived in Ardmore, and prior to that I lived in Bryn Mawr about fifteen years.

Q. Do you know or did you know a Mr. Lynch and Mr. Cionci?

A. Yes, sir.

Q. How long did you know them before this, before they died?

A. Oh, I would say somewhere in the vicinity of eight to ten years.

Q. And where had they lived during that time?

A. Mr. Lynch lived on County Line Road and Mr. Cionci lived on Penn Street.

Q. Now, did you see Mr. Lynch and Mr. Cionci on the afternoon of January 17, 1958?

A. I did.

Q. Where were you at the time?

A. I went into this Al Thum's tavern for a glass of beer at 3 o'clock or 3:30 in the afternoon, and they were there.

Q. And where are you now at Al Thum's tavern?

A. It is on Lancaster Avenue in Bryn Mawr.

Q. Is that spelled T-h-u-m?

[fol. 191] A. That is correct.

Q. On Lancaster Avenue in Bryn Mawr?

A. Yes, sir.

Q. And were Mr. Lynch and Mr. Cionci there when you got there or did they come in after that?

A. They were there when I went in.

Q. And did you have any conversation with them?

A. Well—

Q. First just answer: Did you have any conversation with them?

A. Yes; I did.

Q. About what time of the day was it?

A. It was about 3:30, 3, 3:30.

Q. Now, what conversation did you have with them?

A. Well, they approached me and asked me if they could borrow my car to go to Ardmore to pay a bill.

Q. Which one approached you? Or was it both?

A. They approached me jointly. I don't recall just which one did the talking, but they came up together.

Q. And one or both of them said they wanted to pay a bill in Ardmore?

A. They said they wanted to pay a bill in Ardmore and they have been waiting out for a bus, and it was cold—and it was that day—and they had waited twenty minutes or a half an hour and a bus hadn't come along, and they had gone inside to get warm, and when I came in they asked me if they could borrow the car to go down to Ardmore and pay a bill.

Q. How do you go down to Ardmore from Al Thum's tavern?

A. You go straight down Lancaster Avenue.

Q. Do you know which direction of the compass that is?

A. That is generally east.

[fol. 192] Q. Was anything said about a trip to Media?

A. Oh, no.

Q. Did you say anything to them as to when they were to return?

A. Well, yes. I had some groceries I had gotten in the —in the store across the street, and I told them, well, to hurry back; I had to get them home.

Q. And—

A. They said they would be back in a half an hour.

Q. They said they would be back in a half hour; that would be 3:30 or 4 o'clock?

A. Something like that.

Q. How long does it take to drive a car to Bryn Mawr?

A. From Bryn Mawr? About five minutes.

Q. Did you give them any general permission to use the car as they pleased or for as long as they pleased?

A. No. I merely acceded to their request to borrow the car to go to Ardmore to pay a bill and to return in a half hour or to make it as soon as they could.

Q. Now, is Bryn Mawr Avenue and Castlefinn Road in the direction you would go from Bryn Mawr to Ardmore?

A. Not from Al Thum's place.

Q. What?

A. It would be in the opposite direction from where they started.

Q. That would be in the opposite direction if they had gone—

A. Almost directly opposite.

Q. —from Thum's tavern up to there?

A. Uh-huh.

Mr. Detweiler: Cross-examine.

Mr. Nelson: What was that last question, please?

[fol. 193] (Last question read.)

Mr. Nelson: In order to clarify the matter, if Your Honor please, any questions I ask this witness now under cross-examination is in behalf of John Landis Harris.

Mr. Detweiler: I make the same objection, Your Honor.

The Court: I will overrule the objection.

Cross examination.

By Mr. Nelson:

Q. How do you pronounce your name, sir?

A. Dutcher.

Q. Mr. Dutcher.

Now, Mr. Dutcher, is it possible to go to Media by going through Ardmore?

Mr. Detweiler: I object to that, Your Honor.

The Court: Overruled.

By Mr. Nelson:

Q. What is your answer, sir?

A. Do you want me to answer that?

Well, it is—they are in almost diametrically—

Q. Just answer "Yes" or "No," Mr. Dutcher.

A. Well, if you went around the world, yes. They are almost diametrically opposite directions.

[fol. 194] Q. That isn't what I asked you, sir. I asked you whether or not it is possible to go to Media by going through Ardmore. Now, is it or isn't it?

Mr. Detweiler: Well, I will admit that it is.
The Witness: Do you still want me to answer?

By Mr. Nelson:

Q. I asked you a question, sir.
A. I suppose you could go that way.
Q. Now you say you suppose?
A. Well, if you reversed your direction subsequently; if you continued in that direction, you wouldn't get there.
Q. Now, where did you say you lived?
A. Now? At present?
Q. At the time, which was—
A. Oh, 901 Rail—
Q. —January 17, 1958?
A. Bryn Mawr.
Q. And whereabouts in Bryn Mawr?
A. 901 Railroad Avenue.
Q. Are you married, sir?
A. No, sir.
Q. And with whom do you live?
A. I live alone.

Mr. Detweiler: I object to that, Your Honor.
The Court: He has already answered. It is useless for me to rule on it, isn't it?
Mr. Detweiler: It would. I didn't hear his answer.
[fol. 195] The Court: Well, leave it where it is, then; otherwise I will sustain the objection.

By Mr. Nelson:

Q. Now, Mr. Dutcher, you said at the time you met these two gentlemen where?
A. In, over in Al Thum's tavern on Lancaster Avenue in Bryn Mawr when I entered.
Q. That is a taproom, isn't it?
A. Yes, sir.
Q. And what—what time did you get to the taproom?

A. It was about 3 or 3:30. It was in the middle of the afternoon. I didn't notice it exactly.

Q. And isn't it a fact that you were there all afternoon?

A. I was waiting for them to return, with the exception—

Q. I say: Isn't it a fact that you were in the taproom all afternoon?

A. Not all afternoon, no.

Q. Well, how long were you there?

A. Well, this is five years ago. I waited quite a long while, an hour, I will say, or more, and when they hadn't returned, I got a ride home to tell my wife at the time why I was delayed, and then I went back to wait for them.

Q. Well, now, you said that you had some groceries in the car and you were supposed to take them to your wife.

A. That is correct.

Q. But you didn't do that; instead of that—

A. I couldn't. They were in the car.

Q. Were you in a condition to be able to drive the car, Mr. Dutcher?

A. Certainly.

[fol. 196] Q. Mr. Dutcher, did you ever give a statement relative to this matter to the court reporter?

A. To the court reporter?

Q. To a court reporter?

A. To a court reporter?

Q. Yes.

A. No. This is the first time I have ever appeared in a court in relation to this matter.

Q. This is the first time you have ever given any statement relative to what you are testifying to now, is it?

A. It is not the first time I gave a statement, but it is the first time I gave a statement to a court reporter.

The Court: Well, let us not confuse the witness by the reference to a "court reporter." He apparently takes that to mean to a reporter in a courtroom.

Now, please clarify what you do mean.

By Mr. Nelson:

Q. You were present, Mr. Dutcher, and made a statement, which was taken in the office of Perry J. Shertz, Esq., 31st Floor, Philadelphia Savings Fund Society Building, 10:00 o'clock, on Thursday, April 3rd, 1958, which was taken down by a court reporter; is that correct?

A. I made a statement in that building to a reporter, but I didn't—I misunderstood the "court reporter."

Q. Now, Mr. Dutcher, you testified a moment ago that you did not have much time because you were—intended to go home to take the groceries to your wife; is that correct?

A. That is correct.

Q. And you referred to about a half hour?

[fol. 197] A. That was the time I asked them if they could get back from Ardmore, if they could get back from Ardmore in a half hour. They said "Yes."

Q. Was there any urgency in your getting home with the groceries?

A. Well, some of that was to be used from dinner that night.

Q. So that you wanted to do it in about a half hour; is that correct?

A. Yes. That would have been ample time.

Q. Mr. Dutcher, do you remember a question, this question being asked to you on April 3rd, '58, when you made that statement:

"Q. In view of the fact"—

Mr. Detweiler: What page, Mr. Nelson?

Mr. Nelson: It is on Page 31, first question at the top of the page.

By Mr. Nelson:

Q. "Q. In view of the fact that there was some urgency, I am not saying a great deal of urgency, but some element of urgency, some element of time in getting those groceries home?"

Your answer:

"A. Oh, no. I had two and a half hours to cover about a half mile. I could have walked home in this time."

Do you remember—

Mr. Detweiler: I object to that as immaterial: He could have walked home.

[fol. 198] Mr. Nelson: I haven't finished my question yet, Mr. Detweiler.

Mr. Detweiler: Well, I am going to object to that so far. He could have walked home without his groceries, if they were in the car.

The Court: Well, let us wait for the arguments until the appropriate time.

I will overrule the objection.

By Mr. Nelson:

Q. Do you remember making that statement?

A. I don't remember making the statement. That was, if I am not mistaken, that was five or six years ago. I remember being questioned.

However, my thinking there was that we had dinner at 6 o'clock, and if I were delayed a little bit, it wouldn't make much difference.

But I was—the questions that I was asked that day were being taken on a recorder, as I recall it, and they were coming pretty fast and thick and there wasn't a great deal of time to give much thought to the answers. but that answer is substantially true.

We have dinner about six, and if I didn't get home till five, I guess it would have been plenty of time.

My main concern was wondering where my car was.

Q. Now, did you see the car after the accident, Mr. Dutcher?

A. I saw it the next day, sir.

[fol. 199] Q. And were the groceries in the car?

Mr. Detweiler: Well, I object to that, Your Honor. I don't think, if they weren't,—

The Witness: No. They weren't.

Mr. Detweiler: —I don't think it proves anything.

The Court: I will permit the question. I think I would have to agree with you that there may be very little weight to what the answer might be, but I will permit the question.

By Mr. Nelson:

Q. Were there any groceries in the car?

A. To the best of my knowledge, there weren't. I was more concerned with the total destruction of the car and the injury to these people than I was about the groceries at the moment. I probably looked casually, but I don't recall doing it.

Q. Where did you put the groceries, in the first place?

A. They were in the back seat.

Q. Mr. Dutcher, did you at any time complain to the police that Cionci was driving without your permission, or that he had gone to Media without your permission, at any time at all?

A. I went to the Radnor Police Station the next morning, because I had been told the car was there, and I remember discussing it with a—with a Chief Bones and a Lieutenant Barton at the time, but I am not familiar with the gist of the conversation. I know discussed the accident in general terms.

[fol. 200] That is five or six years ago, and it is pretty hard to remember what was said and what wasn't.

Q. Well, now, you remember a lot of things; you remember about the groceries being in the back seat five or six years ago. Can't you remember? Did you ever make any complaint at all to the police about Cionci?

A. To the best of my knowledge, I did not.

Q. As a matter of fact, Mr. Dutcher, isn't it true that the first time you ever raised that question was when the insurance company talked to you?

A. I don't recall ever making this complaint, because if I had felt that way, I wouldn't have loaned him the keys. I would have loaned it to them jointly.

Q. Well, did you make this statement to the insurance company—

Mr. Detweiler: Would you come up to side bar, please.

The Court: Come up to side bar, please.

(At side bar:)

Mr. Detweiler: I am going to object to Mr. Adler, representing the Lynch estate, putting the questions into the mouth of Mr. Nelson, representing the Harris suit. Now, he either takes part or he doesn't take part. It is obvious that he is addressing all these questions quietly to Mr. Nelson, and I consider them Mr. Adler's questions.

The Court: All right; your objection is duly noted and overruled.

I have noted the same thing, Mr. Adler. I don't know [fol. 201] what effect it has, but the record will show that Mr. Detweiler has objected to your assisting Mr. Nelson in the framing of questions to be posed to this witness. I have overruled the objection, but the record shows that that is what has been going on.

Mr. Nelson: Well, if Your Honor would give us a five—5-minute recess, then I will try to—

The Court: Well, I don't think anybody would want a 5-minute recess in the midst of this witness' cross-examination. That is the reason I am not taking my mid-morning recess at this moment. It is not an appropriate time to do it, either, from the standpoint of witness, counsel—anybody.

This is the way we should proceed while this witness is on the stand until we get through with him while he is under cross-examination. I don't want to interrupt it for all sorts of reasons. I don't want the witness to have any opportunity to reflect. I don't want counsel to reflect.

Understand, by what I have said, I am not meaning to imply that there is anything wrong with what Mr. Adler

is doing, but Mr. Detweiler has raised the question, and it now appears on the record—that is all—

Mr. Nelson: All right.

The Court: —for whatever purpose it may serve in the future.

Mr. Adler: I will take the blame for that, Your Honor. I think—I think my conduct is, perhaps, proper.

[fol. 202] The Court: I don't think we have to go into any extended discussions.

Mr. Adler: Yes. That is right.

The Court: The record now reflects what Mr. Detweiler has objected to.

(End at side bar.)

By Mr. Nelson:

Q. Mr. Dutcher, in view of the fact that you made no objection to anyone about this, as a matter of fact, you didn't mind whether they drove the car to Media or not, did you?

Mr. Detweiler: I object to that.

The Court: Overruled.

The Witness: Well, I don't know. The subject never came up. They didn't even mention Media.

By Mr. Nelson:

Q. Well—

A. I don't know. I don't know what I would have said.

Q. Well, did it make any—

Mr. Nelson: All right; that is all.

Thank you, sir.

[fol. 203] Mr. Detweiler: That is all, Mr. Harris.

Thank you.

The Court: He is Mr. Dutcher.

Mr. Adler: It is Mr. Dutcher on the stand.

Mr. Detweiler: That is all, Mr. Dutcher.

The Court: That is all Mr. Dutcher.

The Witness: Oh, thank you.

The Court: Thank you.

All right; we will now recess for a few minutes for our mid-morning break.

Members of the jury, please do not discuss the case. You will recall the warning I gave you earlier. You are not to discuss this case, even among yourselves, until it is finally concluded and I have given you the instructions on the law.

We will take a 10-minute recess.

(Recess from 11:12 o'clock a. m. to 11:22 o'clock a. m.)

The Court: You may proceed.

Mr. Detweiler: The defendant rests, Your Honor.

I offer in evidence this map, Your Honor, which was, I think, accepted before, but I hadn't offered it.

I ask leave to simply draw in some heavy pencil lines around the words "Bryn Mawr" and "Ardmore" and "Media" simply so that the jury will pick them out without too much hunting around.

[fol. 204] The Court: All right.

As a matter of fact, I think the court reporter has one.

Does counsel have any objection to that marking being done?

Mr. Adler: I have none.

I object, of course, in the estate of Lynch that the map is immaterial and irrelevant.

Mr. Nelson: Yes.

The Court: Yes.

Objection overruled.

Mr. Detweiler: And the point of the accident, the intersection where the accident happened, according to all the—

Mr. Adler: The same objection extends to the addition made by Mr. Detweiler. I make the same objection to the change just made by Mr. Detweiler.

Yes—Your Honor, may I hand up a motion?

The Court: Is this the only one?

Mr. Adler: Mr.—

Mr. Nelson: If the Court please, with apologies for this impromptu motion, but I wish to make a motion for a directed verdict, and I have—I am going to hand it up now, and I will make this thing over again and supply a copy of this to Mr. Detweiler, sir, who has seen this, sir.

Mr. Detweiler: In which case?

[fol. 205] Mr. Nelson: I beg your pardon?

Mr. Detweiler: You are speaking now of the Smith case?

The Court: You are speaking now in your capacity as attorney for the estate of Smith?

Mr. Nelson: As attorney for the estate of Smith; yes, sir.

The Court: That is what Mr. Detweiler asked you.

Mr. Nelson: Well, he already saw it.

I—I—

Mr. Detweiler: I didn't know in which case you made the motion.

Mr. Nelson: Well—

Mr. Detweiler: That is all I asked you.

Mr. Nelson: In the Smith case; yes, sir.

The Court: Have counsel for both sides rested?

Mr. Detweiler: I have rested, Your Honor.

Mr. Nelson: If Your Honor please, I rested in the Smith case, but not in the Harris case, of course. I have two more witnesses in the Harris case.

[fol. 206] The Court: On rebuttal?

Mr. Nelson: Yes, in the nature of rebuttal.

The Court: Well, don't say "in the nature of rebuttal." I take it by the fact that Mr. Detweiler has concluded his defense that, therefore, the plaintiffs must have concluded the presentation of their cases on behalf of the plaintiffs.

Mr. Adler: The estate of Lynch, Your Honor, offers no rebuttal.

The Court: All right.

Mr. Nelson: I have rebuttal witnesses, three very short witnesses, sir.

The Court: On behalf of—
Mr. Nelson: On behalf of John Landis Harris.
The Court: On behalf of John Landis Harris.
All right; put them on before I rule on any points.
Mr. Nelson: Mr. Harris, please.

[fol. 207] JOHN LANDIS HARRIS, recalled.

Direct examination.

By Mr. Nelson:

Q. Mr. Harris, when you got in the automobile, did you at any time see any groceries any place in the car?
A. No.
Q. And you were sitting where?
A. In the—in the rear, in the back.

Mr. Nelson: All right.
Cross-examine.
Mr. Detweiler: No questions.
Mr. Nelson: Thank you, Mr. Harris.
The Court: That is all, Mr. Harris.
Thank you.
Mr. Nelson: Lieutenant Litzenberg, please.

[fol. 208] JOHN W. LITZENBERG, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Nelson:

Q. Lieutenant, you already testified, I believe, that you were an officer of Radnor Township?
A. I am an officer, sir, of Radnor Township Police.
Q. You are familiar with this incident which happened—

The Court: Just a moment, Mr. Nelson.
You said he has already testified. You don't mean here.
The Witness: That is right. No, sir.
Mr. Nelson: I mean prior—

By Mr. Nelson:

Q. Oh, you haven't been on the stand?
A. No, sir.

Mr. Nelson: I beg your pardon. I withdraw that. That is my mistake. That is right.

By Mr. Nelson:

Q. Then, I will ask you, Lieutenant: You are employed by whom?
[fol. 209] A. Radnor Township Police.
Q. And in what capacity?
A. I am now a lieutenant of police. In 19—at the time of the accident I was an officer assigned to investigations.

* * * * * * *

By Mr. Nelson:

Q. Lieutenant, is it possible to go to Media through Ardmore?
A. Yes, sir.

Mr. Detweiler: I object to that, Your Honor. This is not rebuttal.

* * * * * * *

The Court: I will sustain the objection.
It is so obvious as not to require an expert or a policeman or anyone to tell us that it is possible. Of course, it is possible.
Now, you will have the map there, so you may argue, gentlemen, at length from the map as to what is possible and what is not possible.

By Mr. Nelson:

Q. Lieutenant, is it a fairly direct route?
A. Yes, sir.

Mr. Detweiler: I object to that, Your Honor.
The Court: Overruled.

[fol. 210] Mr. Detweiler: That can be proved by the map.

The Court: Overruled.

Mr. Nelson: All right; cross-examine.

Mr. Detweiler: No questions.

* * * * * * *

Mr. Nelson: Officer McCoy, please.

LEONARD J. McCOY, recalled.

* * * * * * *

Direct examination.

By Mr. Nelson:

Q. Now, you have already been sworn, sir?

A. I have. Yes, sir.

Q. You have been on the stand before.

You are Officer McCoy.

A. That is right.

Q. And you are employed by the Radnor Township Police Department?

A. That is right.

Q. You were one of the investigating officers on this case?

[fol. 211] A. I was. Yes, sir.

Q. Now, calling your attention to on or about that day, which was January 17, 1958, in your investigation did you make a search of that car also?

A. I did. Yes, sir.

Q. And when did you do that?

A. Before the car was towed away after the passengers were removed from it.

Q. Did you find anything in the back seat?

A. No groceries.

Q. I beg your pardon?

A. No groceries were in the car.

* * * * * * *

Cross examination.

By Mr. Detweiler:

Q. When did you get there, Officer?

A. I would say about ten minutes of five.

Q. You don't know what time the accident happened, do you?

A. Well, we got a report at 4:45.

Q. You don't know when the accident happened, do you?

A. It happened at approximately 4:45.

Q. How do you know that?

A. Well, I was informed over the radio.

Q. Well, you don't know how soon the radio message got to you after the accident, do you?

A. Well, I was on assignment previous to this, and when I got back in service they told me they had an accident two [fol. 212] or three minutes ago on Bryn Mawr Avenue and for me to get right down there.

By Mr. Detweiler:

Q. You don't really know how long before the accident —how long before you got there that the accident happened, do you?

A. Well, it was—it was in the reasonable amount—

Q. You your—

A. —of time.

Q. You yourself didn't see the accident, did you?

A. I didn't see the accident; no, sir.

Q. Well, then you don't know when it happened, except from what people told you, do you?

A. When we got the report, I know what time we got the report. It was 4:45 and I arrived there at 4:50.

Q. Now, the car was just about completely demolished, wasn't it?

A. Correct.

Q. Why did you search it?

A. Well, it is customary if—for personal belongings, identification of the car—several reasons.

Q. Do you look around the car to see any groceries—

A. Yes.

Q. —or anything else?

A. We do always.

Q. Which way was the car facing after this accident?

A. It was fa—the car was facing south on Bryn Mawr Avenue.

Q. Was there any indication how far the car was, when you got there, from where the point of impact was?

A. Yes. There was physical evidence on the ground.

[fol. 213] Q. What?

A. There was physical—

Q. How far was it?

A. I don't know. I haven't got the report here in front of me, not exactly how many feet.

Mr. Detweiler: All right.

That is all.

The Court: Just a moment, Mr. McCoy.

Are you through?

Mr. Nelson: That is all.

Thank you, sir.

The Court: No further questions.

All right.

Mr. Jenkins: That is all.

That is the plaintiff's case, sir.

Mr. Adler: Your Honor, I would like to renew my motion on behalf of the estate of Lynch.

Mr. Nelson: If Your Honor please, I at this time renew my motion for a directed verdict on behalf of Smith.

The Court: In view of my ruling on the competence of Mr. Dutcher and the limitations upon the jury's right to consider his testimony, I shall have to grant the motion for directed verdict on behalf of Provident Tradesmens Bank and Trust Company, administrator of the estate of John R. Lynch, also known as John Roberts Lynch, deceased; and [fol. 214] also grant the motion for directed verdict on

behalf of Sarah B. Smith, the administratrix of the estate of Thomas W. Smith, deceased.

I shall rule now on the defendant Lumbermens Mutual Casualty Company's points for charge.

Point No. 1 is refused.

Mr. Nelson: If Your Honor please, I hate to interrupt you.

I am not sure that I handed up plaintiff's request for points for charge. It is the same as the other.

The Court: No. 2 will be covered generally and affirmed in principle. I may not use that specific language.

I refuse the first sentence of Point No. 3. I shall leave that matter to the jury, the first two sentences of Request No. 3.

The balance of Point No. 3 I affirm and will cover, generally.

No. 4 I shall cover, generally, and affirm.

No. 5 will be covered, generally, and affirmed.

No. 6, I take it, has been withdrawn.

Mr. Detweiler: I have withdrawn that; yes, sir.

The Court: No. 7 I shall cover, generally, but cautioning Mr. Detweiler that my affirmance of this point does not encompass the specific place as you have indicated it midway in the second line of the first sentence. It will come generally within the question of permission. The instructions will cover, generally, permission.

Mr. Nelson: If Your Honor please, in the plaintiff's re- [fol. 215] quest for points for charge, I wish for Your Honor's permission to withdraw Point No. 2.

The Court: Point No. 1 on behalf of plaintiff John Landis Harris will be covered, generally, in terms of burden and presumption. I will cover the point, generally. This will be a matter that will be left to the jury as to whether a burden has been borne under these circumstances.

No. 2 has been withdrawn.

No. 3 I refuse.

No. 4 I will affirm and cover, generally.

All right, gentlemen, I take it your speeches can be reasonably short and encompassed within the time before we would go to lunch.

I will charge the jury after lunch.

Well, I suppose that is reasonable.

We will take a 5-minute recess, members of the jury, so that counsel can get their closing speeches composed before addressing you, and I will ask you, please, not to discuss the case, even though all the evidence is in now; we still have to wait for the speeches of counsel and the instructions from the Court.

We will take a 5-minute recess.

(Recess from 11:47 o'clock a. m. to 11:52 o'clock a. m.)

Mr. Adler: May we see Your Honor at side bar?

(At side bar:)

Mr. Adler: Your Honor having entered a directed verdict—

(End at side bar.)

[fol. 216] DISCUSSION

Mr. Detweiler: I know what the motion is and I don't oppose it. I think I know what it is.

The Court: All right.

(At side bar:)

Mr. Adler: Your Honor having entered a directed verdict, would you grant permission for counsel for Provident Tradesmen Bank and Trust Company to withdraw from any further proceedings in the case?

The Court: No, no. There may be certain requests made on behalf of the defendants concerning the charge and what-have-you. I just don't know what to anticipate, and I think this would be within my discretion,—

Mr. Adler: It is.

The Court: —and I do not grant permission.

Mr. Adler: Yes. Thank you.

The Court: You may proceed, Mr. Nelson.

Mr. Nelson: I beg your pardon, sir?

The Court: You may proceed. As I take it, you are representing one of the plaintiffs, Mr. Harris?

Mr. Nelson: Yes, sir.

The Court: You may make your speech to the jury.

[fol. 217] Mr. Nelson: * * *

* * * * * * * *

And so there are certain rules of court, and which His Honor has already mentioned to you, which govern this, this case, and we have gotten to the point here now where the issue and the question before you, I believe, is whether or not the insurance company is liable for these—this incident.

Mr. Detweiler: I don't think that is the issue at all, Your Honor. Pardon me for interrupting. I don't think that is the issue at all.

The Court: Let us delineate it as to whether the insurance company will be obligated to afford coverage—

Mr. Nelson: Yes, sir.

The Court: —for Mr. Cionci.

Mr. Nelson: That is exactly what I was attempting to say.

The Court: Well, we have to avoid the use of the term "liability".

Mr. Nelson: Yes, sir.

The Court: We are not trying any lawsuits—

Mr. Nelson: That is right, sir.

[fol. 218] The Court: —but the one that is before us.

Mr. Nelson: What I intended to say, the—the thing, the issue before you is whether or not the insurance company affords liability to the driver of this automobile—we say that the driver of the automobile was Cionci—and His Honor will tell you that there is a presumption in law, and the presumption is that the driver of a car was driving with the permission of the owner, and that presumption

would stand until the other side presents to you credible and believable testimony to overcome that presumption.

* * * * * * *

He says, on that day—well, first of all, he was in a taproom. I asked him how long he had been in there. I forget what the answer was. You will remember.

Mr. Detweiler: I object to any insinuations.

Mr. Nelson: It is no insinuation, sir, whatever. I think—

The Court: It is a statement of fact, Mr. Detweiler.

Mr. Nelson: Sure. That is correct.

As His Honor says, I am merely stating what you heard him say from the stand: That he was in this taproom.

The Court: No—I think what Mr. Detweiler was referring to was the inflection rather than the word.

Proceed.

[fol. 219] Mr. Nelson: I am—I am pretty terrible in inflections sometimes, if Your Honor please.

Mr. Detweiler: I think you are pretty good.

The Court: All right; proceed.

Mr. Nelson: He says that the men came in and he gave his permission, but listen to this, would you: He said that he went to the store and he bought some groceries, and he bought these groceries for his wife.

Now, you gentlemen know, if you go to the store and buy groceries for your wife, as a—you had better take them back to your wife, as far as that is concerned.

He says he went to the store and he bought groceries for his wife. What did he do with them? He got in a taproom.

Well, O.K. Take it for whatever you want to do as far as the evidence from the witness stand.

Mr. Detweiler: Now, Your Honor, I object—

Mr. Nelson: He says—

Mr. Detweiler: —to these references to being in the taproom, because—

The Court: I will sustain the objection to that now.

Mr. Detweiler: And I move for the withdrawal of a juror.

The Court: Motion denied.

[fol. 220] Mr. Nelson: I am not saying anything about a taproom now, sir.

The Court: Motion denied.

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Mr. Nelson: * * *

* * * * * * *

Then when it came over on the way back to Bryn Mawr and they have the accident, and the police officers came there to investigate, and I asked them whether or not they saw anything in the back seat, you remember what they said about it. I don't think there was anything on the police report with reference to it.

Now, where did this grocery business come in?

Also I asked the police whether or not Mr. Dutcher made any complaint as to whether or not he had specifically stated where those men were to drive the car. You will remember that evidence.

But after four years he tells about some groceries that he got that he had on the back seat of the car.

Now, you just think back a little bit. Think last Thursday what happened, or a week before that, and see if you can remember all this clearly.

So, you see, it is very, very important, members of the jury, because that presumption remains until the other side convinces you with proper, believable and credible evidence. Until you are convinced of that, then the presumption is that whoever was operating that car—in this case, Cionci—was operating it with the permission of the owner of the car, who happened to be Dutcher.

[fol. 221] Now, of course, the insurance company has insured the automobile belonging to Mr. Dutcher. Mr. Dutcher is a defendant in this case. So that whatever liability or obligation might be, it is, as I stated, on the part of the insurance company to take care of its obligation as to its assured—as to its assured.

Now, the assured would be Dutcher, but, as I say, the presumption is that whoever was driving that car was

driving it with the permission of that assured and, therefore, would be covered by the policy.

So I think, without belaboring it any more, without taking any more of your time, I have tried to be brief, and I have tried to just bring in the issue as far as the plaintiff John Landis Harris is concerned. I want you to consider it very, very carefully and think it over.

The only little point is about that—that grocery there, and after four years how anybody can remember that so very carefully to say that he bought the groceries and he had to take it home to his wife, but then in the other testimony that he gave, which was shortly after it and which I referred to in this testimony, which was taken down. there wasn't anything about any hurry; there was time for it, and so forth.

So unless you are convinced with absolute and believable and credible testimony to overcome that, then I ask you that it should be in favor of the plaintiff John Harris Landis.

Mr. Detweiler: (Addressed the jury.)

* * * * * * *

Mr. Nelson: (Addressed the jury again.)

[fol. 222]

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The Court: Members of the jury, we will recess now. I will ask you to be back in your seats promptly at 1:45, at which time I will give you the instructions on the law which you will apply to the facts as you find them.

In the meantime, it is still not proper for you to discuss the case, even among yourselves, and you are expressly instructed not to.

Court will stand in recess till 1:45.

(Recess at 12:19 o'clock p. m. to 1:45 o'clock p. m.)

* * * * * * *

LUONGO, J.

Members of the jury, I am sure that at some stages of this trial it sounded terribly complicated. If it did, at any stage, it ought not be or is not at all complicated now.

There is really only one issue which is before you in this trial. It boils down to this: Was Donald Cionci driving Mr. Dutcher's automobile with Mr. Dutcher's permission?

The reason that is important is that Mr. Dutcher has a contract with his insurance company, a contract which we ordinarily refer to as an "insurance policy". Under that contract the insurance company agreed to defend any suits and to pay any claims arising out of accidents in which Mr. Dutcher was the driver of the car and, beyond that, in [fol. 223] which any other person was the driver, if that person was using the automobile with Mr. Dutcher's permission.

Donald Cionci was driving the automobile on January 17, 1958. That has now been conceded. There is no question about that.

In Radnor Township the car which he was driving was involved in an accident. Out of that accident a number of lawsuits have been started and are in process. The question here is whether the coverage of Mr. Dutcher's insurance policy is available for the persons who were involved in that accident.

When this case first started out to you there were involved the estates of John R. Lynch, who was a passenger in the car with Cionci, and the estate of Thomas W. Smith, who was the driver of the other automobile. They are no longer in the case, those estates, because you will recall that I instructed you at one stage of the trial that you could only consider Mr. Dutcher's testimony as against Mr. Harris, who was a passenger in the automobile being driven by Mr. Cionci and who is still alive—he was here and testified before you—that you could not consider that testimony

against the estates of the two persons who are now dead.

They are no longer in the case in this respect, that I am directing you, as a matter of law here and now, that you must return a verdict in favor of the Provident Tradesmens Bank and Trust Company, the administrator of the estate of John R. Lynch, deceased, and you must return a verdict in favor of Sarah B. Smith, administratrix of the estate of Thomes W. Smith, deceased, because there is a presumption in the law that a person driving an automobile is doing so with the permission of the owner; therefore, the very proof that Mr. Cionci was driving the automobile—and that fact was conceded by the defendant—is sufficient to establish [fol. 224] the presumption in the law that it was with the permission of Mr. Dutcher.

The only evidence to rebut that presumption is the testimony of Mr. Dutcher. Obviously, since I have instructed you, you may not consider that testimony against the estates of the two deceased persons. There is no testimony, therefore, for you to consider to rebut the presumption, and I must then instruct you, as a matter of law, that the presumption prevails and Mr. Cionci, in so far as the estates of the two deceased persons is concerned, was driving with the permission of the owner, Mr. Dutcher, and consequently the insurance coverage is available.

But that is not the situation with respect to the plaintiff in this lawsuit, John Landis Harris. He is still alive. Therefore, Mr. Dutcher's testimony may be considered as against Mr. Harris.

Mr. Harris wasn't present when this automobile was loaned to Mr. Cionci and Mr. Lynch. So he relies upon that same presumption: Cionci was driving; therefore, he was driving with the permission of the owner; and that presumption remains until such time as the defendant, Lumbermens Mutual, in this case, and the estate of Cionci, produces some credible evidence, some believable evidence to show either that there was no permission granted at all to Donald Cionci, or that a limited permission was granted and that that limited permission was exceeded.

There is no question, apparently, there is no contradiction of Mr. Harris' own testimony that he was picked up by Donald Cionci in Media. You will have the map before you during your deliberations and you will see where Media is.

You have testimony of Mr. Dutcher, which you must consider, that the car was loaned at Bryn Mawr. You have [fol. 225] testimony of Mr. Dutcher as to precisely what he said, what was asked of him by Cionci and Lynch, and what he, Mr. Dutcher, said in reply to that request made by Lynch and Cionci, as it bears upon the permission which he gave to use his automobile.

First, if you do not believe Mr. Dutcher at all, if there is no credible testimony, Mr. Harris has the presumption operating in his favor and you would then have to conclude that Mr. Cionci was driving with Mr. Dutcher's permission.

But if you determine that Mr. Dutcher is credible, believable, that the testimony which he gave is worthy of belief by you, then you must consider just precisely what it was that he said. What permission did he grant?

There was testimony, as I recall, from Mr. Dutcher that Lynch and Cionci indicated they wanted to go to Ardmore, perhaps a mile or two away from Bryn Mawr, to pay a bill, or something to that effect. It is for you to determine and to recall precisely what the testimony was.

If Mr. Dutcher gave permission only to go to Ardmore and return, and Cionci drove to Media, I think that we would all agree that, when you look at this map, that goes beyond what you would call a minor deviation from the permission, because of the distance that is involved.

There is also a possibility that Mr. Dutcher's permission was limited in space, destination and return being Ardmore, as he testified at one point, or possibly it was limited as to time. As I recall, he indicated he provided that they would be back in a half hour. Then there was some other questioning of him which seemed to indicate that perhaps a couple of hours might have been involved. But this is all for you to recall precisely what the testimony was.

The thing that you must consider is whether Mr. Dutcher's testimony is credible and, if you determine that it is [fol. 226] credible, you will have to interpret precisely what permission he gave to Cionci to drive this car and whether that permission was exceeded. If the permission was exceeded, then you must find in favor of the defendant.

Now, how are you going to determine who to believe here? You don't leave your common sense outside when you come in here. You have to determine from listening to the witnesses as to which one you are going to believe. In this case you have only one man whom you are going to have to consider, and that is Mr. Dutcher himself.

You will have to determine from his demeanor on the witness stand whether he was telling a straightforward story. You will have to determine how precise he was, how positive he was, whether he equivocated in his testimony. You have to consider whether he has any interest in the outcome of this proceeding, and in that regard I must instruct you that Mr. Dutcher, it has been stipulated on this record, is a defendant in some of the lawsuits which have been instituted arising out of this accident. It is to his interest that he preserve as much as possible of his insurance policy coverage to protect himself in the suits which are instituted against him. If the protection of the policy is not available to Cionci, the driver, it will then be more available to Mr. Dutcher in the other proceedings.

But that is only a factor for you to consider in determining whether his testimony is credible. You will use all of the tests that you use in your everyday lives in determining whether he has been truthful in what he has testified to you, and his credibility; not only his truthfulness, I might say, but his accuracy, whether you are justified in relying precisely upon what he said, whether he was precise in what he said. His credibility both as to truthfulness [fol. 227] and accuracy is most crucial, because there is nobody alive today who was present when he loaned this car to Mr. Cionci.

You will have to determine from Mr. Dutcher's testimony alone just what permission he gave to Cionci in driving this car.

You have to bear one other thing in mind: Whenever a plaintiff institutes a lawsuit, he has what we call the "burden of proof". He must satisfy you by a preponderance of the evidence of the validity of his claim.

In this case, Mr. Harris, the plaintiff, has to satisfy you by a preponderance of the evidence that Mr. Cionci was driving this car with the permission of Mr. Dutcher. He wasn't present; consequently, he relies entirely upon the presumption in the law about which I charged you.

That presumption is enough to carry the burden of proof, but only until such time as the defendant by any credible evidence eliminates that presumption by showing that there was no permission. Once the defendant has done that, the burden of proof, the obligation which the plaintiff has to satisfy you by a preponderance of the evidence, the plaintiff will no longer be able to carry it, because satisfying you by a preponderance of the evidence requires testimony which would convince you that the permission here is more likely so than not so.

It all depends on whether you are going to believe Mr. Dutcher and, if you believe Mr. Dutcher, precisely what permission did he give? If you get to the point where you believe that he gave a limited permission, and that the limited permission was exceeded, then you must return a verdict in favor of the defendant.

Your verdict must be unanimous. Unless and until you have unanimously agreed upon a verdict, it is not the verdict of the jury.

[fol. 228] You have just one issue, really, to determine: To what extent was there permission given?

I know that you will use every effort to come to a unanimous conclusion here in order that you may be able to render a verdict. If you cannot, if any of you is convinced even though you might be in the minority, that your view of the facts is correct, then you should not give in solely

for the sake of expediency. If you can, by a free exchange of views, come to a unanimous conclusion, by all means you should do so.

Any exceptions or additions?

Mr. Detweiler: I would like to ask a couple. Could I ask them at side bar, Your Honor?

The Court: Yes.

(At side bar:)

Mr. Detweiler: Your Honor spoke about permission as though—and throughout the charge spoke about permission as though that was the issue.

Permission to operate the car was granted in this case. It was the deviation from that permission which was the basis of our defense.

The Court: You spoke of "deviation" and I spoke of "exceeding". Is there a difference?

Mr. Detweiler: No; I don't think there is a difference, but throughout the charge you were talking about permission,—

The Court: Oh. I will clarify it.

[fol. 229] Mr. Detweiler: —but not the question of deviating from it.

The Court: I will clarify that it is conceded that permission was given and it is a question of to what extent the permission extended.

Mr. Detweiler: Now, Your Honor spoke about the availability of the policy to persons involved in the accident. The only question here is the availability of the policy to Cionci.

The Court: I spoke of it only in terms of the possible interest of a witness. That is all.

Mr. Detweiler: May I have an exception to that part, Your Honor?

The Court: Yes; and what was the first point?

Mr. Detweiler: I ask Your Honor to charge in line with one of my points for charge that if the permission was to

go to Ardmore and return, then a trip to Media was a substantial deviation, as a matter of law.

Your Honor said to the jury that you assume—

The Court: "We would all agree."

I will leave it the way I did.

I will grant you an exception.

Mr. Detweiler: All right, sir.

Your Honor also stated that the defendant—or, rather, Dutcher—not the defendant—but Dutcher stated that a couple of hours was involved.

[fol. 230] My recollection is that he didn't say that he had given authority to these men to use the car for a couple of hours, but that if he got home in a couple of hours that would be all right.

Mr. Nelson: Same thing, isn't it?

Mr. Detweiler: No.

The Court: No, not necessarily.

Mr. Detweiler: And I wrote down here "any interest in this proceeding", and I can't recall what connection in which I wrote that.

The Court: Perhaps in connection with my instructions that they would have to consider whether Mr. Dutcher had an interest, in determining his credibility.

Mr. Detweiler: Yes, yes.

I don't think that there is any evidence which can be submitted to the jury in this case—to the jury, understand—that there is an interest adverse, that Dutcher has an interest adverse to the outcome of this proceeding.

The Court: I will grant you an exception.

Mr. Detweiler: Adverse to the other parties as to the outcome of these proceedings.

The Court: I grant you an exception.

I will try to clarify the other points.

(End at side bar.)

[fol. 231] The Court: Members of the jury, I have been asked to clarify one or two points.

One, I left it entirely up to you in my instructions to determine if any permission whatsoever was given by Mr. Dutcher. I have been asked to instruct you that it has been conceded that some permission was granted, but that the permission was exceeded or there was a deviation from the permission that was granted.

Notwithstanding that concession, I think I must necessarily leave it up to you, as I did at the outset, to determine whether Mr. Dutcher's testimony is credible. The concession here as to permission again is predicated on Mr. Dutcher's testimony that he gave permission. It is going to be up to you to determine whether you want to believe anything that Mr. Dutcher said. That is up to you.

I will instruct you that the defendant has conceded that some permission was given here. It is the defendant's contention that the permission was a limited permission to go to Ardmore and return and to be back within a half hour. That is the defendant's contention.

In the course of my instructions to you, it was pointed out to me that I indicated that perhaps Mr. Dutcher had given permission that could last as long as several hours. I think I did make such a statement, when, in fact, I intended only to point out testimony where at one point there was a question of his having to leave for home within a half hour; at another point in the testimony it appears that he had indicated he had several hours before he had to go home. This does not necessarily indicate that there was permission given to have the car for several hours.

I misstated the contention in that respect or misstated the testimony in that respect. In the final analysis, it is your recollection of the testimony which governs, not mine, not counsel's; it is your recollection which will govern.

[fol. 232] The Court: Is there anything further?

Mr. Detweiler: No, sir.

The Court: All right; let the marshal be sworn.

I see no purpose in the policy going out.

Mr. Detweiler: No; I don't think that ought to go out.

The Court: Pardon?

Mr. Detweiler: No; I don't think that that ought to go out with the jury.

The Court: No; I think it was very simple, the point I gave to them, and I don't think they will need the policy.

Is there any objection to the map going out? I believe that was by agreement.

Mr. Detweiler: I would like that to go out with the jury.

The Court: Any objection, Mr. Nelson?

Mr. Nelson: No.

The Court: All right; then the map may go out. I don't even know if the map has been marked for identification. Has it?

Mr. Detweiler: No; I don't think it has. It would be D-1.

[fol. 233] The Court: Well, I think it ought to be marked, anyway, even if we mark it as—

Mr. Detweiler: D-1 is the only exhibit I offered.

The Court: Pardon?

Mr. Detweiler: It is the only exhibit I offered. It would be D-1.

The Court: D-1, which was what?

Mr. Detweiler: It hasn't been marked, I say. If Your Honor thinks it should be, and I agree with you it should be marked.

The Court: Oh, yes, I think that if it is going to go out, certainly it ought to be identified for the record.

Would you mark it, Mr. Bosta.

(Franklin's Official Map of Eastern Delaware County, Pennsylvania, was marked Exhibit D-1 for identification.)

The Court: Let the marshal come forward to be sworn.

(Deputy marshal sworn.)

The Court: At this stage I will now excuse Alternates 1 and 2 from this panel and from further service. You have now come to the end of your term of service, and I thank you very much for the service that you have performed,

but now that the members of the jury retire to deliberate, we cannot allow you to be in with them.

[fol. 234] Thank you very much.

(Jury out at 2:16 o'clock p. m. with D-1.)

Mr. Adler: Your Honor, unaccustomed as I am to directed verdicts, may I ask that the judgment be entered on the verdict in the estate of Lynch at the present time instead of waiting for the jury to return?

The Court: Yes. I think that it would be appropriate. As a matter of fact, I was just discussing it with the clerk of the court. She advises me that she simply records the directed verdict and that judgment will be entered on the directed verdict.

It has been done variously. There have been times when the jury returns and the clerk at that time indicates, "In accordance with the direction of the Court, you have returned a verdict for the plaintiff," but in this case, to avoid complications, I think it is sufficient that we will now enter judgment on the verdict for the two estates.

Mr. Adler: Thank you, Your Honor.

The Court: And you are, therefore, excused.

Mr. Adler: Thank you.

The Court: Court will recess awaiting the return of the jury.

Mr. Adler: If I may speak in a gratuitous manner, Your Honor, I thought your charge was extremely clear.

[fol. 235] The Court: Thank you.

Mr. Jenkins: Thank you, Your Honor. I appreciate your courtesy.

(Recess at 2:18 o'clock p. m.)

(Jury in at 2:53 o'clock p. m.)

(Counsel as heretofore noted.)

The Court: All right; you may inquire of the jury as to whether they have arrived upon a verdict.

Deputy Clerk (Miss Jenckes): Will the jury please rise.

Members of the jury, have you agreed upon your verdict?

Forelady: We have.

VERDICT

Deputy Clerk: Do you find for the plaintiff, John Landis Harris, or do you find for the defendant, Lumbermens Mutual Casualty and George M. Patterson, administrator of the estate of Donald Cionci?

Forelady: We are in favor of the plaintiff.

The Court: All right; you may record the verdict.

Deputy Clerk: Members of the jury, hearken unto your verdict as the Court hath recorded it: In the issue joined wherein John Landis Harris is plaintiff and Lumbermens [fol. 236] Mutual Casualty Company and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, are defendants, you find for the plaintiff and against the defendant and, in accordance with the verdict as directed by the Court, you find in favor of the plaintiffs, Provident Tradesmen Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased, and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased, and against the defendants, Lumbermens Mutual Casualty Company and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, and so say you all?

The Jury: We do.

Deputy Clerk: All right; you may be seated.

* * * * * * *

(Jury discharged at 2:55 o'clock p. m.)

* * * * * * *

(Adjourned at 2:58 o'clock p. m.)

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR DIRECTED VERDICT—
Filed December 14, 1962

Plaintiff, Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased, by her Counsel, moves this Honorable Court to direct a verdict in favor of Plain-
[fol. 237] tiff and against the Defendants, Lumbermens Mutual Casualty Co. and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, on the issue that the Estate of Donald Cionci is an assured within the meaning of the insurance policy issued by Lumbermens Mutual Casualty Co. to Edward S. Dutcher and in support thereof alleges as follows:

1. The evidence conclusively establishes that Donald Cionci was operating the automobile of Edward S. Dutcher within the permissive use clause of the aforementioned policy, as defined under the caption Persons Insured of Part I, (a) (2).

Respectfully submitted,

Herbert C. Nelson.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR DIRECTED VERDICT—
Filed December 14, 1962

Plaintiff, Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased, by its Counsel, moves this Honorable Court to direct a verdict in favor of Plaintiff and against the Defendants, Lumbermens Mutual Casualty Co. and George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, on the issue that the Estate of Donald Cionci is an assured within the meaning of the insurance policy issued by Lumbermens Mutual Casualty Co. to Edward S. Dutcher and in support thereof alleges as follows:

[fol. 238] 1. The evidence conclusively establishes that Donald Cionci was operating the automobile of Edward S. Dutcher within the permissive use clause of the aforementioned policy, as defined under the caption Persons Insured of Part I, (a) (2).

Respectfully submitted,

Freedman, Landy & Lorry, By: Avram G. Adler, Bayard M. Graf, J. Willison Smith, Jr.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUEST FOR POINTS FOR CHARGE—
Filed December 14, 1962

The plaintiffs by their evidence have established such facts that there is a presumption that Donald A. Cionci was operating the motor vehicle with the permission of the owner of the vehicle and was an assured within the terms of the policy. The defendant then has the burden to come forward with the evidence and if he does not disprove this presumption by credible evidence that in fact such permission was not granted or that the permission granted was exceeded in scope, then you must find a verdict in favor of the plaintiffs that Donald A. Cionci was an assured within the terms of the policy. *Exner* v. *Safeco Ins. Co. of America*, 402 Pa. 473 (1961); *Waters* v. *New Amsterdam Cas. Co.*, 393 Pa. 247 (1958).

3. If you believe that permission was granted to Cionci to go to Ardmore, then Cionci has not exceeded the scope [fol. 239] of that permission until such time as he has been to Ardmore and returned the car to the custody of the owner. *Freshkorn* v. *Marietta*, 345 Pa. 416 (1942); *Laroche* v. *F. B. Mut. Auto. Ins. Co.*, 335 Pa. 478 (1939).

4. A driver of an automobile has not exceeded the permission granted him by the owner and remains an assured within the terms of the policy if the deviation from that

permission is slight and inconsequential. *Laroche* v. *F. B. Mut. Auto. Ins. Co.*, 335 Pa. 478 (1939).

Respectfully submitted,

Herbert C. Nelson, Attorney for John Landis Harris.

IN UNITED STATES DISTRICT COURT

DEFENDANT LUMBERMENS MUTUAL CASUALTY COMPANY'S POINTS FOR CHARGE—Filed December 14, 1962

The learned Trial Judge is respectfully requested to charge the jury as follows:

1. Under all the evidence in this case your verdict must be in favor of the defendant, Lumbermens Mutual Casualty Company.

2. The only issue to be decided in this case is whether or not the Cionci Estate is entitled to the protection of Mr. Dutcher's insurance policy. Whether or not the claimants in any of the other law suits arising out of this accident will [fol. 240] recover damages, or against whom they may obtain verdicts or judgments, has no bearing on your decision in this case and will not be decided by your verdict in this case.

3. Members of the jury, permission to drive approximately one mile from Bryn Mawr to Ardmore to pay a bill and return, did not give authority to drive in a different direction, to Media, a distance of approximately ten miles. This was not a slight deviation. If you find that Mr. Dutcher did not give Lynch or Cionci either express or implied permission to drive to Media, your verdict must be in favor of the defendant Lumbermens Mutual Casualty Company. (Truex v. Pa. Mfrs. Assn. Cas. Ins. Co., 116 Pa. Supr. 551, 553.)

4. Although there is a presumption that the operator of an automobile is operating it with the permission of the

owner, that presumption disappears as a rule of law if the owner offers credible evidence to the contrary, and the presumption has no further effect upon the outcome of the case. (Waters v. New Amsterdam Casualty Co., 393 Pa. 247, 252.)

5. The burden of persuading you that Cionci was acting within the permission granted by Dutcher remains with the plaintiff, and unless the plaintiff meets that burden by a fair preponderance of the evidence, your verdict must be in favor of the defendant Lumbermens Mutual Casualty Company.

6. In weighing the testimony of Dutcher, you may take into consideration the fact that the outcome of this trial [fol. 241] means nothing to him since he already has the advantage of the protection of the Defendant's insurance policy.

7. If you find that Lynch and Cionci were not given permission to drive to Media, your verdict must be in favor of the defendant Lumbermens Mutual Casualty Company. It is of no importance that the accident happened on the return from Media to Bryn Mawr rather than on the journey from Bryn Mawr or Ardmore, to Media. Freshkorn v. Marietta, 345 Pa. 416, 419, 420.)

Respectfully submitted,

Swartz, Campbell & Henry, By Lynn L. Detweiler, Attorneys for Defendant, Lumbermens Mutual Casualty Company.

IN UNITED STATES DISTRICT COURT

MOTION AND REASONS FOR NEW TRIAL—
Filed December 19, 1962

And Now, December 18, 1962, the defendant, Lumbermens Mutual Casualty Company, by its attorneys, Swartz, Campbell & Henry, moves the Court to grant a new trial

in the above entitled case, and assigns the following reasons therefor:

1. The verdict was against the law.

2. The verdict was against the evidence.

3. The verdict was against the weight of the evidence.

[fol. 242] 4. The verdict was against the charge of the Court.

5. The learned Trial Judge erred in failing to charge the defendant's third point for charge which reads as follows:

> "3. Members of the jury, permission to drive approximately one mile from Bryn Mawr to Ardmore to pay a bill and return, did not give authority to drive in a different direction, to Media, a distance of approximately ten miles. This was not a slight deviation. If you find that Mr. Dutcher did not give Lynch or Cionci either express or implied permission to drive to Media, your verdict must be in favor of the defendant Lumbermens Mutual Casualty Company. (Truex v. Pa. Mfrs. Assn. Cas. Ins. Co., 116 Pa. Supr. 551, 553.)"

6. The learned Trial Judge erred in failing to charge the defendant's seventh point for charge reading as follows:

> "7. If you find that Lynch and Cionci were not given permission to drive to Media, your verdict must be in favor of the defendant Lumbermens Mutual Casualty Company. It is of no importance that the accident happened on the return from Media to Bryn Mawr rather than on the journey from Bryn Mawr or Ardmore, to Media. (Freshkorn v. Marietta, 345 Pa. 416, 419, 420.)"

7. The learned Trial Judge erred in instructing the jury that Edward S. Dutcher was incompetent to testify as a witness in the cases of the plaintiffs John R. Lynch, Deceased, and Thomas W. Smith, deceased.

8. The learned Trial Judge erred in granting binding instructions in favor of the plaintiffs John R. Lynch estate and Thomas W. Smith estate against the defendant Lumbermens Mutual Casualty Company.

[fol. 243] The defendant, Lumbermens Mutual Casualty Company, reserves the right to assign additional reasons for new trial upon receipt of the notes of testimony.

Swartz, Campbell & Henry, By Lynn L. Detweiler, Attorneys for Defendant, Lumbermens Mutual Casualty Co.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR JUDGMENT N. O. V.—
Filed December 19, 1962

And Now, December 18, 1962, the defendant, Lumbermens Mutual Casualty Company, by its attorneys, Swartz, Campbell & Henry, having submitted a point for binding instructions in favor of the defendant, and said point having been overruled by the Court, respectfully moves the Court to have all evidence transcribed of record and for judgment in favor of the defendant, Lumbermens Mutual Casualty Company, non obstante veredicto.

Swartz, Campbell & Henry, By Lynn L. Detweiler, Attorneys for Defendant, Lumbermens Mutual Casualty Co.

IN UNITED STATES DISTRICT COURT

OPINION—June 17, 1963

LUONGO, J.

Defendant, Lumbermens Mutual Casualty Company (Lumbermens), has presented motions for new trial and for [fol. 244] judgment n. o. v. following an adverse verdict in this declaratory judgment proceeding under 28 U. S. C. A.

§2201. The action involved the question of coverage of a policy of insurance issued by Lumbermens to one Edward S. Dutcher, the named insured. In addition to Dutcher, the policy insured ". . . any person using such automobile, provided the actual use thereof is with the permission of the named insured." This action, resulting in directed verdicts in favor of two Estate plaintiffs (Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith), and a verdict by the jury in favor of plaintiff John Landis Harris, against defendant Lumbermens, arose out of the following circumstances:

On January 17, 1958, John Lynch and Donald Cionci, driving the automobile of Edward Dutcher, picked up John Landis Harris in Media, Pennsylvania. On the way from Media to Bryn Mawr, the Dutcher vehicle, driven by Cionci, was involved in a collision with a truck operated by Thomas W. Smith. Lynch, Cionci and Smith were killed, Harris was injured.

As a result of the accident three trespass actions were commenced:

(a) Harris instituted suit in the Court of Common Pleas of Delaware County against Dutcher, the Lynch Estate and the Cionci Estate;

(b) The Smith Estate instituted suit in the Court of Common Pleas of Delaware County against the same defendants named in the Harris suit;

(c) The Lynch Estate commenced an action in this Court against the Cionci Estate.

[fol. 245] When Lumbermens refused to defend the Cionci Estate in the action in this Court and to make available the coverage of the policy issued to Dutcher to satisfy any verdict or judgment in favor of the Lynch Estate, this declaratory judgment action was instituted by the Adminis-

trator of the Lynch Estate seeking a declaration that Cionci was driving with Dutcher's permission, that Cionci was, therefore, an insured under the policy in question, and that the policy is available to satisfy a verdict or judgment obtained by the Lynch Estate in its action against the Cionci Estate. Lumbermens joined, as an additional defendant, the Cionci Estate and, as additional plaintiffs, John Landis Harris and the Smith Estate. A subsequent motion by Lynch's Estate to sever Harris and the Smith Estate as plaintiffs was successfully resisted by Lumbermens.

At the trial of the declaratory judgment action plaintiffs proved the existence of the insurance policy, Dutcher's ownership of the car and the fact (conceded at the trial by Lumbermens) that Cionci was the driver of the car. This was a diversity suit with all operative facts occurring in Pennsylvania, hence Pennsylvania law was applicable. *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3rd Cir. 1960) cert. den. 364 U. S. 835 (1960). Under Pennsylvania law proof of the above facts raises a presumption that Cionci was driving with Dutcher's permission, and, in the absence of credible testimony to rebut the presumption, justifies the entry of a directed verdict in favor of the plaintiff. *Exner* v. *Safeco Insurance Company of America*, 402 Pa. 473 (1961); *Waters* v. *New Amsterdam Casualty Company*, 393 Pa. 247 (1958).

Lumbermen's defense was that Cionci's use deviated substantially from the permission granted by Dutcher, that he was therefore operating without permission and the cov- [fol. 246] erage of the policy was not available to him. Lumbermens offered to prove by the testimony of Dutcher that he had given permission to Lynch and Cionci to drive to Ardmore, Pennsylvania, a point a mile or two from Bryn Mawr, to enable one of the two to pay a bill and to return without delay. Timely objection was made by the two Estate plaintiffs to the offer of Dutcher's testimony. Dutcher was ruled incompetent, under the Pennsylvania Dead Man's Act, to testify against the two Estates but he was permitted to testify as to Harris. With Dutcher's testimony ruled out,

there was no evidence, as to the two Estate plaintiffs, to rebut the presumption of permission and, on the authority of the *Exner* and *Waters* cases the jury was directed to return verdicts in favor of the Lynch Estate and the Smith Estate. Harris' case was submitted to the jury which returned a verdict in favor of Harris.

1. *Motion for a new trial as to the Lynch and Smith Estates:*

Dutcher's competency to testify against the two Estate plaintiffs is controlled by the Pennsylvania Dead Man's Act, 28 P. S. 322, which in pertinent part provides:

> "Nor, where any party to a thing or contract in action is dead, . . . and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased . . . , be a competent witness to any matter occurring before the death of said party, . . ."

[fol. 247] Competency of a witness is the rule in Pennsylvania and incompetency the exception. *Hendrickson Estate,* 388 Pa. 39, 44 (1957). One of the exceptions is the disqualification of surviving parties to a transaction and any other person whose interest is adverse to the interest of a decedent. *Hendrickson Estate,* supra, at page 45. The test of adversity expressed in *Gaston Estate,* 361 Pa. 105, 109 (1949), and reiterated in *Com. Trust Co., Admr.* v. *Szabo,* 391 Pa. 272, 281, 282 (1957), is as follows:

> "The true test of the interest of a witness is that he will either gain or lose, as the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent."

The issue is a simple one, whether Dutcher's interest in this case was such as to render him incompetent under the foregoing tests. Lumbermens seeks to equate "interest" with "money" and contends that, since Dutcher is not a party to these proceedings, he has nothing to gain or lose from the judgment entered in these proceedings. That is too narrow a view. The subject matter of this suit is the coverage of Lumbermens' policy issued to Dutcher. Depending upon the outcome of this trial, Dutcher may have the policy all to himself or he may have to share its coverage with the Cionci Estate, thereby extending the availability of the proceeds of the policy to satisfy verdicts and judgments in favor of the two Estate plaintiffs. Sharing the coverage of a policy of insurance with finite limits with another, and thereby making that policy available to claimants against that other person is immediately worth less than having the coverage of such policy available to Dutcher [fol. 248] alone. By the outcome in the instant case, to the extent that the two Estate plaintiffs will have the proceeds of the policy available to them in their claims against Cionci's estate, Dutcher will lose a measure of protection. Conversely, to the extent that the proceeds of this policy are not available to the two Estate plaintiffs Dutcher will gain. I will not indulge as Lumbermens would have me do, in speculation as to whether any of the plaintiffs have a real probability of recovery against Dutcher, or as to the size of the verdicts which may be rendered in favor of any of the plaintiffs against any of the defendants. It is sufficient for the purpose of determining adversity that it appears clearly that the measure of Dutcher's protection under this policy of insurance is dependent upon the outcome of this suit. That being so, Dutcher's interest in these proceedings is adverse to the interest of the two Estate plaintiffs, the parties who represent, on this record, the interests, of the deceased persons in the matter in controversy.

Lumbermens' motion for new trial against the Estate of Lynch and the Estate of Smith is denied.

2. *Motions as to Harris:*

(a) *Motion for judgment n.o.v.:*

Lumbermens' motion for judgment n.o.v. was not preserved as required by Rule 50 and for that reason must be denied. *Massaro* v. *United States Lines Company*, 307 F. 2d 299 (3rd Cir. 1962). Nevertheless I feel obliged to offer the following comments on the lack of merit of the motion.

Lumbermens relies on *Waters* v. *New Amsterdam Cas. Co.*, 393 Pa. 247 (1958). That case does not support Lum- [fol. 249] bermens' position, instead it confirms in every respect the procedure employed in the trial of this case. The basic problem in *Waters* was burden of proof. The trial judge there had instructed the jury that where a person is driving a vehicle owned by another there is a presumption that the vehicle is being driven with the permission of the owner and the presumption shifts the burden to the defendant to prove by a preponderance of the evidence that the vehicle was being driven without permission. The Supreme Court of Pennsylvania set aside the verdict, and in awarding defendant a new trial, held that the burden of proof does not shift and the instructions on that point were erroneous. In accord with the Supreme Court's holding in *Waters*, supra, the jury in the instant case was instructed that the plaintiff Harris had the burden of proving by a preponderance of evidence that Cionci was driving the automobile in question with Dutcher's permission.[1]

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[1] "You have to bear one other thing in mind: Whenever a plaintiff institutes a lawsuit, he has what we call the 'burden of proof'. He must satisfy you by a preponderance of the evidence of the validity of his claim.

"In this case, Mr. Harris, the plaintiff, has to satisfy you by a preponderance of the evidence that Mr. Cionci was driving this car with the permission of Mr. Dutcher. He wasn't present; consequently, he relies entirely upon the presumption in the law about which I charged you.

"That presumption is enough to carry the burden of proof, but only until such time as the defendant by any credible evidence eliminates that presumption by showing that there was no permission. Once the defendant has done that, the burden of proof,

To satisfy his burden, Harris relied on the presumption of permission. Lumbermens called Harris and Dutcher to [fol. 250] show that limited permission was granted and that Cionci had exceeded it. Harris testified that Cionci and Lynch, in the Dutcher automobile, picked him up at Media, Pennsylvania, late in the afternoon of the day in question. Dutcher testified on *direct* examination that: About 3 p. m. on January 17, 1958, while in a taproom in Bryn Mawr, Pennsylvania, he was approached by Cionci and Lynch who asked to borrow his car to go to Ardmore to pay a bill; Dutcher consented but asked them to hurry back because there were groceries in the car which he had to take home; the two said they would be back in one-half hour; nothing was said about Media and no general permission to use the car was given; Dutcher ". . . merely acceded to their request to go to Ardmore to pay a bill and return in a half hour or to make it as soon as they could" (N. T. 156).

On cross-examination, however, and by rebuttal witnesses, Dutcher's direct testimony was shaken in several material respects. He contradicted his statement that he was in a hurry to get home in a half hour by later admitting that he probably had a couple of hours to get home. Second, the motive for his "hurry to get home", i.e., to give his wife the groceries which were in the car, was challenged by testimony of other witnesses that there were no groceries in the car. Another fact brought out on cross-examination was that Dutcher in his discussions with officers investigating the accident never complained or mentioned that he had merely given Cionci and Lynch limited permission to use his car.

In addition to those contradictions, the jury could very properly have considered two other factors as bearing on

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the obligation which the plaintiff has to satisfy you by a preponderance of the evidence, the plaintiff will no longer be able to carry it, because satisfying you by a preponderance of the evidence requires testimony which would convince you that the permission here is more likely so than not so" (N. T. 207-208).

Dutcher's credibility. One was Dutcher's interest in the outcome of this trial, his interest in retaining for his own protection the maximum amount of his automobile liability insurance coverage. The other was his manner and de- [fol. 251] meanor in testifying. He was not an impressive witness and his testimony was not such that I would, were it within my power to do so, direct the jury to believe it as a matter of law.

Testimony offered by a defendant to rebut the presumption of permission was discussed in extenso in *Waters* v. *New Amsterdam Cas. Co.*, supra. There, at page 253, the Supreme Court of Pennsylvania said:

> "The burden of persuasion on the issue of the permission of the driver of the automobile remains with the plaintiff. (Citations omitted.) Therefore, when the defendant assumes his burden of going forward with the evidence on the issue of permission and presents evidence clearly indicating that no permission was granted so that a jury could not reasonably find otherwise, then if the plaintiff fails to produce evidence that permission had been granted, the court should direct a verdict for the defendant."

In applying that principle, the Court stated:

> "In the trial of the case defendant attempted to meet his obligation by adducing testimony that Koch did not have permission to use the Dreistadt automobile. Plaintiffs on the other hand, sought to shake the credibility of the defendant's witnesses through cross-examination and to elicit testimony from them that Koch did have permission. The court then properly permitted the case to go to the jury."

Referring to the factual situation before it, the Court said at page 253, n. 5:

> *"The court may not direct a verdict for the defendant in such a case because the jury must have the oppor-*

tunity to resolve the conflicts in the testimony of defendant's witnesses. * * *" (Emphasis supplied.)

[fol. 252] The above quoted language from *Waters,* particularly the latter portions, makes it abundantly clear that in the instant case defendant did not present " . . . evidence clearly indicating that no permission was granted so that a jury could not reasonably find otherwise . . . " The contradictions in Dutcher's testimony, his interest in the outcome of the case and his demeanor in testifying were factors which compelled submission of the issue to the jury. It would have been error to do otherwise.

Lumbermens contends, however, that its "concession" that permission was granted to go to Ardmore compels a verdict to be entered in its favor. But here Lumbermens "conceded" something which the plaintiff neither contended nor undertook to prove, consequently it was not a concession. Lumbermens cannot, therefore, substitute such a "concession" for the "credible evidence" which it was obligated to produce. Its "concession" was a matter of proof, and one which depended on Dutcher's oral testimony. The jury was entitled to disbelieve his testimony entirely, including the so called concession. Even if the jury regarded Dutcher as a credible witness, it was still for the jury to determine the scope of the oral permission which Dutcher gave. There was conflict, from Dutcher's testimony alone, as to precisely what was said and done. The scope of the permission depended upon which of Dutcher's conflicting statements the jury accepted, and further what was meant by what he said in dealing with Cionci and Lynch at the time they borrowed the car from him.

Whether or not Dutcher was a credible witness was one matter; whether or not he gave credible testimony as to a limited permission to use his car was another. The determination of the second question depended upon the jury's reconciliation of the various contradictions in Dutcher's tes-
[fol. 253] timony and the weight they attached to his interest and manner of testifying. Following the dictates of

Waters, supra, all of those questions were left to the jury under appropriate instructions.[2] It was the jury's function to determine what Dutcher meant to express by the words

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[2] "First, if you do not believe Mr. Dutcher at all, if there is no credible testimony, Mr. Harris has the presumption operating in his favor and you would then have to conclude that Mr. Cionci was driving with Mr. Dutcher's permission.

"But if you determine that Mr. Dutcher is credible, believable, that the testimony which he gave is worthy of belief by you, then you must consider just precisely what it was that he said. What permission did he grant?

"There was testimony, as I recall, from Mr. Dutcher that Lynch and Cionci indicated they wanted to go to Ardmore, perhaps a mile or two away from Bryn Mawr, to pay a bill, or something to that effect. It is for you to determine and to recall precisely what the testimony was.

"If Mr. Dutcher gave permission only to go to Ardmore and return, and Cionci drove to Media, I think that we would all agree that, when you look at this map, that goes beyond what you would call a minor deviation from the permission, because of the distance that is involved.

"There is also a possibility that Mr. Dutcher's permission was limited in space, destination and return being Ardmore, as he testified at one point, or possibly it was limited as to time. As I recall, he indicated he provided that they would be back in a half hour. Then there was some other questioning of him which seemed to indicate that perhaps a couple of hours might have been involved. But this is all for you to recall precisely what the testimony was.

"The thing that you must consider is whether Mr. Dutcher's testimony is credible and, if you determine that it is credible, you will have to interpret precisely what permission he gave to Cionci to drive this car and whether that permission was exceeded. If the permission was exceeded, then you must find in favor of the defendant" (N. T. 204-205).

* * * * * * *

"It all depends on whether you are going to believe Mr. Dutcher and, if you believe Mr. Dutcher, precisely what permission did he give? If you get to the point where you believe that he gave a limited permission, and that the limited permission was exceeded, then you must return a verdict in favor of the defendant" (N. T. 208).

[fol. 254] which it found were spoken when the car was loaned. *McCormack* v. *Jermyn*, 351 Pa. 161 (1945).[3]

(b) *Motion for New Trial:*

Lumbermens' motion for a new trial as to Harris has two aspects: (i) alleged errors in the charge to the jury; and (ii) an allegation that prejudice was created when the Court directed verdicts in favor of the Estate plaintiffs.

The contention based on alleged errors in the charge can be disposed of without extended discussion. The extracts from the charge quoted above (footnotes 1 and 2) conform to the requirements of *Exner* v. *Safeco Ins. Co. of America*, 402 Pa. 473 (1961), and *Waters* v. *New Amsterdam Cas. Co.*, 393 Pa. 247 (1958). They substantially and adequately covered the points for charge submitted by defendant Lumbermens.

The other issue stems from Lumbermens' allegation that it was prejudiced in its case against Harris by the fact that verdicts were directed in favor of the two Estates. Professor Moore has stated in 5 Moore's Federal Practice, ¶50:02, n. 7, that: "Where no evidence is adduced to disprove the [fol. 255] prima facie case of the plaintiff and his evidence stands uncontradicted and unimpeached, the court should direct [a verdict]." This is precisely what was done in the instant case. Lumbermens' contention, in essence, is that a verdict may never be directed in multiple party litigation without creating prejudicial error. I know of no such rule.

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[3] Mr. Justice Stern, in *McCormack* v. *Jermyn*, in speaking of the function of the court and jury in contract cases made the following statement, at page 165, which is relevant here:

> "The rule however is undoubted, that the meaning of words used in conversation, *and what the parties intended to express by them*, is exclusively for the jury to determine.
>
> *"The sense of words used in connection with what the parties intended to express by them* is exclusively for the jury to determine. The judge may not put a legal interpretation on oral words, and make it a matter of positive direction. It is the province of the court to expound the meaning of an instrument, but not of words uttered of which there can be no tenor."

The well established practice is directly to the contrary. In the instant case the court made it clear beyond question to the jury that while Dutcher was incompetent to testify against the two Estates, he was a competent witness against Harris. The jury was also instructed that Harris as plaintiff had the burden of proof on the issue of permission. These instructions were sufficient to protect Lumbermens' interests in the Harris case. I must assume, in the absence of evidence to the contrary, that the jury followed those instructions. There is nothing to indicate that it did not.

Apart from the lack of substance to the allegation of prejudice, Lumbermens itself was responsible for the very state of the record of which it now complains. After having joined the additional plaintiffs and defendant, it vigorously and successfully contested the motion of the Lynch Estate to sever those additional parties. Moreover, Lumbermens rejected a number of suggestions designed to avoid this very situation, including one suggestion that the issue be submitted to the jury as to all plaintiffs with the proviso that Estate plaintiffs be given full opportunity to cross-examine without thereby waiving their position as to incompetence under the Dead Man's Act. Lumbermens created the multiple party situation and rejected all efforts to eliminate the problems caused by the joinder. It cannot be heard now to complain of prejudice.

Lumbermens' motion for a new trial against Harris is denied.

[fol. 256]

IN UNITED STATES DISTRICT COURT

ORDER—June 17, 1963

And Now, this 17th day of June, 1963, it is Ordered that the motions of defendant, Lumbermens Mutual Casualty Company, for new trial and for judgment n.o.v. be and they are hereby Denied.

Counsel for plaintiffs may submit a form of declaratory judgment upon notice to counsel for the defendant.

Alfred L. Luongo, J.

IN UNITED STATES DISTRICT COURT

JUDGMENT—July 8, 1963

And Now, this 8th day of July, 1963, in conformity with the verdict of the jury rendered December 14, 1962, and the disposition of the post trial motions of defendant, Lumbermens Mutual Casualty Co., by the Court in the Opinion and Order filed herein on June 17, 1963, it is hereby

Ordered, Adjudged and Decreed that:

1. Donald Cionci was driving the motor vehicle owned by Edward S. Dutcher and insured by the Lumbermens Mutual Casualty Co. under its policy No. WL 126 559 with the permission of Edward S. Dutcher, on January 17, 1958.

2. The said Donald Cionci was an insured as defined in [fol. 257] said policy of insurance No. WL 126 559 issued by the Lumbermens Mutual Casualty Co.

Alfred L. Luongo, J.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 72 (b)—Filed August 7, 1963

Notice is hereby given that Lumbermens Mutual Casualty Company, one of the defendants above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on July 8, 1963.

Swartz, Campbell & Henry, By Lynn L. Detweiler, Attorneys for Appellant, Lumbermens Mutual Casualty Company.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO COURT OF APPEALS—
Filed August 7, 1963

Notice is hereby given that Provident Tradesmens Bank and Trust Co., Administrator of the Estate of John R. Lynch, a/k/a John Robert Lynch, Deceased, plaintiff in the above captioned action hereby appeals to the United States Court of Appeals for the Third Circuit from the limitations of the judgment entered on July 8, 1963; to wit the refusal [fol. 258] of the District Court to include therein the further paragraphs set forth in plaintiff's proposed judgment, namely, 3, 4 and 5; said paragraphs reading as follows:

"3. Said policy of insurance No. WL 126 559 issued by Lumbermens Mutual Casualty Company is available to satisfy the judgment obtained by Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, Deceased, a/k/a John Robert Lynch in its action against George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, in this Court identified as Civil Action No. 25194, plus interest and costs.

"4. Said policy of insurance No. WL 126 559 issued by Lumbermens Mutual Casualty Company is available to satisfy the medical payment provisions contained in such policy to the extent therein set forth for such medical expenses incurred by Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch a/k/a John Robert Lynch.

"5. Said policy of insurance No. WL 126 559 issued by Lumbermens Mutual Casualty Company is available to satisfy the verdicts or judgments obtained or hereafter obtained by John Landis Harris and Sarah B. Smith, Administratrix of the Estate of Donald Cionci, Deceased, instituted in the Court of Common Pleas of Delaware County, Pennsylvania at No. 1048 and No. 1047, December Term, 1959, respectively."

"It is further

"ORDERED, ADJUDGED AND DECREED that the defendant Lumbermens Mutual Casualty Company shall pay to plaintiff Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, [fol. 259] Deceased, the judgment which said plaintiff Provident Tradesmens Bank and Trust Company has against George M. Patterson, Administrator of the Estate of Donald Cionci, Deceased, arising out of Civil Action 25194 in the United States District Court for the Eastern District of Pennsylvania, plus interest and cost therein."

Freedman, Landy and Lorry, By Morris S. Finkel, Attorneys for Provident Tradesmens Bank and Trust Co., Administrator for Est. of John R. Lynch, Dec'd.

August 7, 1963.

TO OUR POLICYHOLDERS:

Lumbermens is *your* company. By virtue of this policy, you have become a member and an owner of this mutual insurance corporation.

Directors you elect and officers they choose endeavor to administer the affairs of your company in a manner that will merit your approval. Their efforts can be made more effective with your full cooperation. The greater the success of the company, the greater will be your benefit from membership, which includes cash dividends paid annually to policyholders.

You can cooperate—

—by working with the company in its comprehensive safety program to prevent accidents and reduce losses.

—by securing as new policyholders the best type of employers, motorists, and property owners, thereby benefiting them as well as strengthening your company.

—by giving the management constructive criticism and suggestions for the improvement of its departments, branch offices, and service generally.

The annual meeting of the company is held at the Home Office on the third Tuesday in May at 11:00 A.M. The management hopes you will attend whenever possible.

Lumbermens commends the policy auditing service of its agents to assist policyholders with respect to all types of insurance. Call upon either the company or your agent for information about your policies or advice concerning any of your insurance problems.

Respectfully,

Chairman

AA129 1-57 30M ED. 56 F.A.P.

FAMILY AUTOMOBILE POLICY

SERVICE SAVING SECURITY

(ALL COVER FORM)

NOTICE

This Family Automobile Policy is issued in reliance on your Declarations 3 and 4 (see attachment on back inside cover) regarding the description and number of private passenger and utility automobiles owned by you and your spouse. Any discrepancy not explained by endorsement should be reported to your agent.

Replacement or additional automobiles should be reported promptly to your agent so that our record of your protection will be up to date at all times.

LUMBERMENS MUTUAL CASUALTY COMPANY

HOME OFFICE

MUTUAL INSURANCE BUILDING, CHICAGO 40

P-2

CA 2645

The Insured is hereby notified that by virtue of this policy he is a member of the Lumbermens Mutual Casualty Company and is entitled to vote either in person or by proxy at any and all meetings of said Company. The annual meetings are held at its Home Office in Chicago, Illinois, on the third Tuesday of May in each year at eleven o'clock A.M.

PLEASE READ YOUR POLICY

NON-ASSESSABLE

In wording, this policy is identical with the standard provisions used by most of the major companies writing automobile insurance in the United States.

In form the policy has been designed to make it easier for you to know what your automobile insurance does for you.

The number of your policy appears on the Declarations Page—see back inside cover.

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This is not a complete and valid contract without an accompanying DECLARATIONS PAGE FORM AA130 properly executed.

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Line up top of Declarations Page with this edge →

Line up top of endorsements, if any, with this line →

[fol. 262]

LUMBERMENS MUTUAL CASUALTY COMPANY

(A MUTUAL INSURANCE COMPANY, HEREIN CALLED THE COMPANY)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all of the terms of this policy:

Part I—Liability

Coverage A—Bodily Injury Liability;
Coverage B—Property Damage Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage";

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

Supplementary Payments

To pay, in addition to the applicable limits of liability:

(a) all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon;

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of an automobile insured hereunder, not to exceed $100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war;

(d) all reasonable expenses, other than loss of earnings, incurred by the insured at the company's request.

19. Special North Carolina Condition—Proofs of Loss. As respects the State of North Carolina, the failure of the insured to furnish proofs of loss as required by the terms of this policy shall not debar him from recovery hereunder unless within fifteen days after receipt of notice of loss the company or its representative shall provide the insured with a blank or blanks in duplicate, to be used for the purpose of making such proofs of loss.

20. Special Kansas Condition. As respects the State of Kansas, paragraph (a) of the Condition "Insured's Duties in Event of Loss" is amended to read "(a) use every reasonable means to protect the automobile covered by this policy from any further loss; reasonable expense incurred in affording such protection shall be deemed incurred at the company's request." The Condition "Appraisal" is amended by substituting the words "within 30 days after proof of loss is filed" for the words "within 60 days after proof of loss is filed."

21. Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

22. Declarations. By acceptance of this policy, the insured named in Item 1 of the declarations agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

23. Mutual Policy Conditions. This is a perpetual mutual corporation owned by and operated for the benefit of its members. This is a non-assessable, participating policy under which the Board of Directors in its discretion may determine and pay unabsorbed premium deposit refunds (dividends) to the insured.

"private passenger automobile" means a private passenger, station wagon or jeep type automobile;

"utility automobile" means an automobile with a load capacity of fifteen hundred pounds or less of the pick-up body, sedan delivery or panel truck type;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business purposes with other than a private passenger or utility automobile;

"automobile business" means the business of selling, repairing, servicing, storing or parking of automobiles;

"use" of an automobile includes the loading and unloading thereof;

"war" means war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident to any of the foregoing.

A Exclusions

This policy does not apply under Part I:

(a) to any automobile while used as a public or livery conveyance, but this exclusion does not apply to the named insured with respect to bodily injury or property damage which results from the named insured's occupancy of a non-owned automobile other than as the operator thereof;

(b) to bodily injury or property damage caused intentionally by or at the direction of the insured;

(c) to bodily injury to any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured;

(d) to bodily injury to any fellow employee of the insured injured in the course of his employment if such injury arises out of the use of an automobile in the business of his employer, but this exclusion does not apply to the named insured with respect to injury sustained by any such fellow employee;

(e) to an owned automobile while used in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which such resident or the named insured is a partner, or any partner, agent or employee of such resident or partnership;

(f) to a non-owned automobile while used (1) in the automobile business by the insured or (2) in any other business or occupation of the insured except a private passenger automobile operated or occupied by the named insured or by his private chauffeur or domestic servant, or a trailer used therewith;

(g) to injury to or destruction of property owned or transported by the insured, or property rented to or in charge of the insured other than a residence or private garage.

[fol. 264]

14. Limits of Liability.

Part I The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence; the limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of the company's liability for all such damages arising out of bodily injury sustained by two or more persons as the result of any one occurrence.

The limit of property damage liability stated in the declarations as applicable to "each occurrence" is the total limit of the company's liability for all damages arising out of injury to or destruction of all property of one or more persons or organizations, including the loss of use thereof, as the result of any one occurrence.

Part II The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

Part III The limit of the company's liability for loss shall not exceed the actual cash value of the property, or if the loss is of a part thereof the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the property or such part thereof with other of like kind and quality, nor the applicable limit of liability stated in the declarations; provided, however, the limit of the company's liability (a) for loss to personal effects arising out of any one occurrence is $100, and (b) for loss to any trailer is $500.

15. Other Insurance.

Part I If the insured has other insurance against a loss covered by Part I of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.

Part II The insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance.

Coverage C—Medical Payments

To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," caused by accident, while occupying or through being struck by an automobile;

Division 2. To or for any other person who sustains bodily injury, caused by accident, while occupying

(a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or

(b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the named insured or its operation on his behalf by his private chauffeur or domestic servant or (2) its operation or occupancy by a relative and it is a private passenger automobile or trailer not regularly furnished for the use of such relative.

☒ Definitions

The definitions under Part I apply to Part II, and under Part II:

"occupying" means in or upon or entering into or alighting from;

"an automobile" includes a trailer of any type.

☐ Exclusions

This policy does not apply under Part II to bodily injury:

(a) sustained while occupying (1) an owned automobile while used as a public or livery conveyance, or (2) any vehicle while located for use as a residence or premises;

(b) sustained by the named insured or a relative (1) while occupying an automobile owned by the named insured or any relative, other than an owned automobile, or (2) while occupying or through being struck by (i) a vehicle operated on rails or crawler-treads, or (ii) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads;

(c) to any person other than the named insured or a relative, resulting from use of (1) a non-owned automobile in the automobile business or as a public or livery conveyance, or (2) a non-owned automobile in any other business or occupation, except operation or occupancy of a private passenger automobile by the named insured or by his private chauffeur or domestic servant; or of a trailer used therewith;

(d) to any person who is employed in the automobile business, if the accident arises out of the operation thereof and if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

(e) due to war.

[fol. 265]

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6. Action Against Company.
Part I No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

Parts II and III No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy nor, under Part III, until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

7. Medical Reports; Proof and Payment of Claim.
Part II As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

8. Insured's Duties in Event of Loss.
Part III In the event of loss the insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the insured's failure to protect shall not be recoverable under this policy; reasonable expenses incurred in affording such protection shall be deemed incurred at the company's request;

(b) file with the company, within 91 days after loss, his sworn proof of loss in such form and including such information as the company may reasonably require and shall, upon the company's request, exhibit the damaged property and submit to examination under oath.

Coverage D—Collision

To pay for loss caused by collision to the owned automobile or to a non-owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto.

Coverage E (1)—Comprehensive—Excluding Collision
(2)—Personal Effects

(1) To pay for loss caused other than by collision to the owned automobile or to a non-owned automobile. For the purpose of this coverage, breakage of glass and loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion shall not be deemed to be loss caused by collision.

(2) To pay for loss caused by fire or lightning to robes, wearing apparel and other personal effects which are the property of the named insured or a relative, while such effects are in or upon the owned automobile.

Supplementary Payments

In addition to the applicable limit of liability:

(a) to reimburse the insured for transportation expenses not exceeding $5 per day or totaling more than $150, incurred during the period commencing 72 hours after a theft covered by this policy of the entire automobile has been reported to the company and the police, and terminating when the company tenders settlement for such theft;

(b) to pay general average and salvage charges for which the insured becomes legally liable, as to the automobile being transported.

Definitions

The definitions of "named insured," "owned automobile," "temporary substitute automobile," "private passenger automobile," "utility automobile," "automobile business," "relative" and "war" in Part I apply to Part III, and under Part III:

"insured" means the named insured and (a) with respect to the owned automobile, any person or organization maintaining, using or having custody of said automobile with the permission of the named insured; (b) any relative, with respect to a non-owned automobile not regularly furnished for his use;

"non-owned automobile" means a private passenger automobile or trailer not owned by the named insured or any relative, other than a temporary substitute automobile, while said automobile or trailer is in the possession or custody of the insured or is being operated by him;

[fol. 266]

"loss" means direct and accidental loss of or damage to (a) the automobile, including its equipment, or (b) other insured property;

"collision" means collision of an automobile covered by this policy with another object or with a vehicle to which it is attached or by upset of such automobile;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business purposes with other than a private passenger or utility automobile, and if not a home, office, store, display or passenger trailer.

Exclusions

This policy does not apply under Part III:

(a) to any automobile while used as a public or livery conveyance;

(b) to loss due to war;

(c) to loss to a non-owned automobile arising out of its use by the insured in the automobile business;

(d) to damage which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage results from a theft covered by this policy;

(e) to tires, unless damaged by fire, malicious mischief or vandalism, or stolen or unless the loss be coincident with and from the same cause as other loss covered by this policy;

(f) under coverage D, to breakage of glass if insurance with respect to such breakage is otherwise afforded.

Conditions

Conditions 1, 2, 3, 4, 6, and 14 through 22, apply to all Parts.

Conditions 5, and 7 through 13, apply only to the Parts noted thereunder.

1. Policy Period, Territory. This policy applies only to accidents, occurrences and loss during the policy period and within the United States of America, its territories or possessions, or Canada, or between ports thereof.

2. Premium. If the named insured disposes of, acquires or replaces a private passenger or utility automobile or, with respect to Part III, a trailer, he shall inform the company during the policy period of such change. Premium shall be adjusted as of the date of such change, in accordance with the manuals in use by the company. The named insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

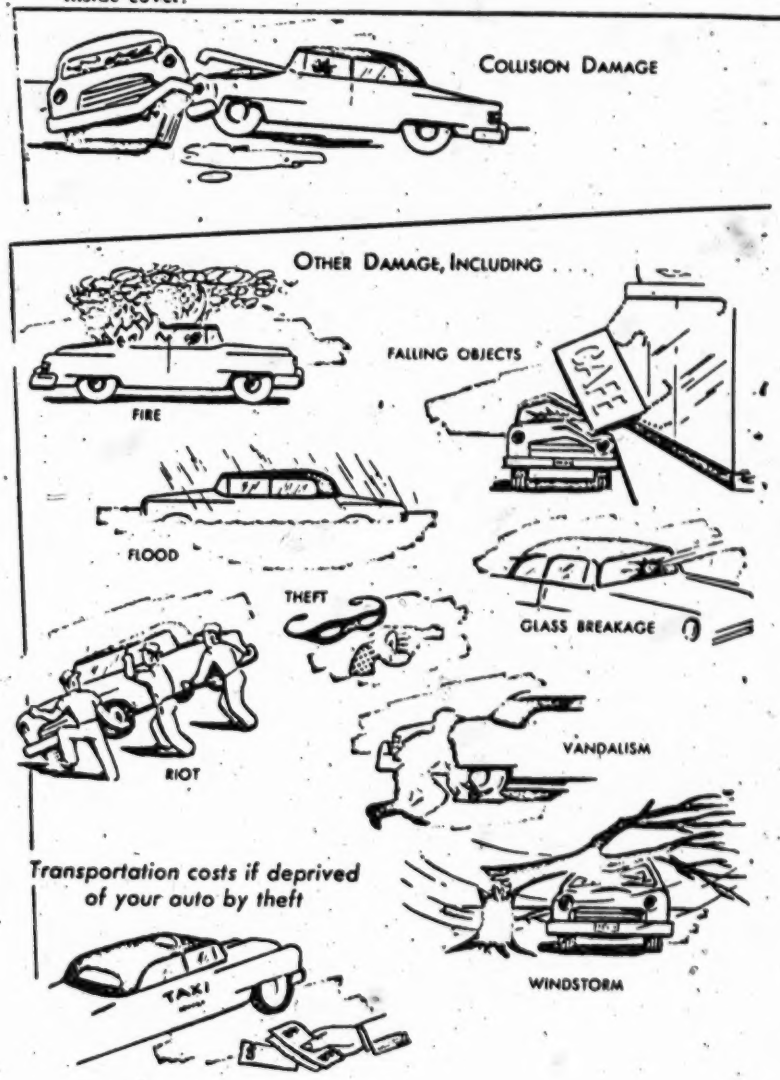
3. Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

4. Two or More Automobiles. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto.

5. Assistance and Cooperation of the Insured. Parts I and III The insured shall cooperate with the company and, upon the company's request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

[fol. 267]

To determine whether these coverages are afforded, and the amount of insurance you have, see Declarations page on back inside cover.



9. Appraisal. Part III — If the insured and the company fail to agree as to the amount of loss, either may, within 60 days after proof of loss is filed, demand an appraisal of the loss. In such event the insured and the company shall each select a competent appraiser, and the appraisers shall select a competent and disinterested umpire. The appraisers shall state separately the actual cash value and the amount of loss and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The insured and the company shall each pay his chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

10. Payment of Loss. Part III — The company may pay for the loss in money; or may repair or replace the damaged or stolen property; or may, at any time before the loss is paid or the property is so replaced, at its expense return any stolen property to the named insured, or at its option to the address shown in the declarations, with payment for any resultant damage thereto; or may take all or such part of the property at the agreed or appraised value but there shall be no abandonment to the company. The company may settle any claim for loss either with the insured or the owner of the property.

11. No Benefit to Bailee. Part III — The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

12. Subrogation. Parts I and III — In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

13. Financial Responsibility Laws. Part I — When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

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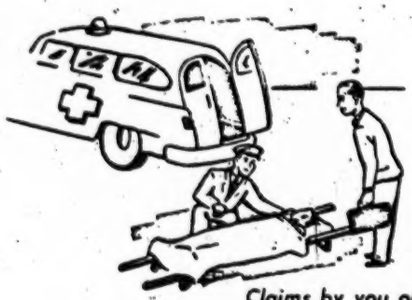
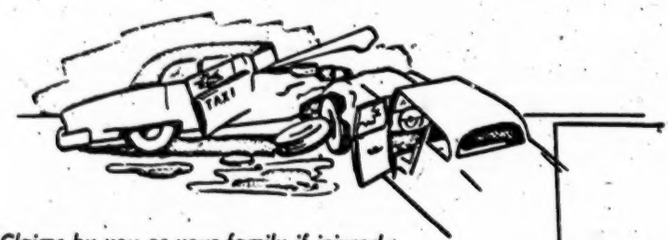
[fol. 2681]



Claims by you or your family, or other people, if injured in your own car



Claims by you or your family if injured in another car, including a bus or taxi

Claims by you or your family if injured as pedestrians

Part III If the insured has other insurance against a loss covered by Part III of this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of this policy bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible insurance.

16. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized officer or representative of the company.

17. Assignment. Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the insured named in Item 1 of the declarations, or his spouse if a resident of the same household, shall die, this policy shall cover (1) the survivor as named insured, (2) his legal representative as named insured but only while acting within the scope of his duties as such, (3) any person having proper temporary custody of an owned automobile, as an insured, until the appointment and qualification of such legal representative, and (4) under division 1 of Part II any person who was a relative at the time of such death.

18. Cancelation. This policy may be canceled by the insured named in Item 1 of the declarations by surrender thereof to the company or any of its authorized agents or by mailing to the company written notice stating when thereafter the cancelation shall be effective. This policy may be canceled by the company by mailing to the insured named in Item 1 of the declarations at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of the surrender or the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by such insured or by the company shall be equivalent to mailing.

If such insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancelation is effected or as soon as practicable after cancelation becomes effective, but payment or tender of unearned premium is not a condition of cancelation.

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[fol. 269]

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Persons Insured

The following are insureds under Part I:

(a) With respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;

(b) With respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to a private passenger automobile or trailer not regularly furnished for the use of such relative;

(c) Any other person or organization legally responsible for the use of

(1) an automobile or trailer not owned or hired by such person or organization, or

(2) a temporary substitute automobile,

provided the actual use thereof is by a person who is an insured under (a) or (b) above with respect to such automobile or trailer.

The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

Definitions

Under Part I:

"named insured" means the individual named in Item 1 of the declarations and also includes his spouse, if a resident of the same household;

"insured" means a person or organization described under "Persons Insured";

"relative" means a relative of the named insured who is a resident of the same household;

"owned automobile" means a private passenger or utility automobile or trailer owned by the named insured, and includes a temporary substitute automobile;

"temporary substitute automobile" means any automobile or trailer while temporarily used as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

"non-owned automobile" means an automobile or trailer not owned by the named insured or any relative, other than a temporary substitute automobile;

IN WITNESS WHEREOF, the LUMBERMENS MUTUAL CASUALTY COMPANY has caused this policy to be signed by its President and Secretary at Chicago, Illinois, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized representative of the company.

H. L. Kennicott — Secretary

W. S. Kemper — President

[fol. 270]

This is not a complete and valid contract without an accompanying DECLARATIONS PAGE FORM AA130 properly executed.

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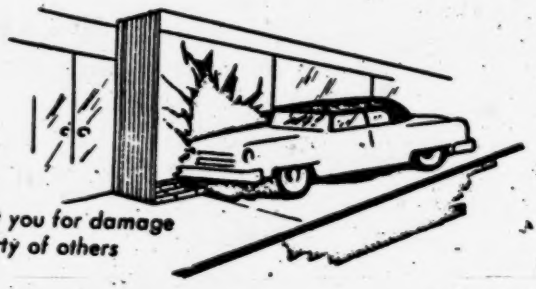
[fol. 271]

To determine whether Bodily Injury and Property Damage Liability coverages are afforded, and the limits of liability you have, see Declarations page on back inside cover.

Claims against you for death or injury to others



Claims against you for damage to property of others

Costs of legal defense (provided as part of liability coverages)

Cost of bail bonds for traffic violations

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[fol. 273]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25149

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased,

vs.

GEORGE M. PATTERSON, Administrator of the Estate of Donald Cionci, Deceased, 414 Highland Avenue, Collingswood, New Jersey.

COMPLAINT

1. Plaintiff is a corporation incorporated under the laws of the Commonwealth of Pennsylvania, engaged in the banking and trust business with a place of business located at the Southeast corner of Seventeenth and Chestnut Streets, Philadelphia, Pennsylvania, and was duly appointed Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased, by the Register of Wills of Delaware County, Pennsylvania, on the Fourth day of March, 1958.

[fol. 274] 2. Defendant is a citizen of the State of New Jersey, residing at 414 Highland Avenue, Collingswood, New Jersey, and was duly appointed Administrator of the Estate of Donald Cionci, Deceased, by the Register of Wills of Delaware County, Pennsylvania, on the Second day of July, 1958.

3. Jurisdiction in this case is based upon diversity of citizenship and amount in controversy.

4. On January 17, 1958, one Donald Cionci, whose estate is the defendant herein, negligently and carelessly drove a motor vehicle in which one John R. Lynch, also known as

John Roberts Lynch, was a passenger, in a public highway called Bryn Mawr Avenue, Radnor Township, Pennsylvania, in such a manner that it was caused to strike, run into and collide with another vehicle on the said highway.

5. As a result, the said John R. Lynch, also known as John Roberts Lynch, sustained a fracture of the skull, contusions and eventration of the brain, laceration of the left hand and multiple abrasions, severe flail of the chest, cut on left ankle, and other injuries, resulting in his death on February 4, 1958, after suffering great pain of body and mind and incurring expenses for medical attention and hospitalization hereinafter set forth.

6. This action is brought pursuant to the provisions of the Fiduciaries Act of 1949, P. L. 512, Sections 601 and 603 of the Commonwealth of Pennsylvania, on behalf of the Estate of John R. Lynch, also known as John Roberts Lynch, deceased.

[fol. 275] 7. Plaintiff claims, on behalf of the Estate of John R. Lynch, also known as John Roberts Lynch, the damages suffered by the said Estate by reason of the death of the decedent, as well as for the pain and suffering the decedent underwent prior to his death, including surgical bills of $1,000.00, hospital bills of $1,621.74 and bills for nursing services of $112.00.

Wherefore Plaintiff demands judgment against defendant in the sum of One Hundred Thousand Dollars ($100,000.00) and costs.

Bayard M. Graf, J. Willison Smith, Jr., Attorneys for Plaintiff.

[fol. 276]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25149

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased,

vs.

GEORGE M. PATTERSON, Administrator of the Estate of Donald Cionci, Deceased, 414 Highland Avenue, Collingswood, New Jersey.

MOTION FOR APPROVAL OF SETTLEMENT

1. This action was commenced on August 4, 1958, against the Administrator of the Estate of Donald Cionci, Deceased, to recover damages for the death of plaintiff's decedent caused by the negligence of Donald Cionci, the driver of a motor vehicle in which plaintiff's decedent was riding as a passenger on January 17, 1958.

2. Service of Summons and copy of the Complaint was made on the defendant on August 11, 1958, by the United States Marshal and due return made thereby.

[fol. 277] 3. A copy of the Complaint was forwarded by plaintiff's counsel to the Lumbermens Mutual Casualty Company, the insurer of the owner of motor vehicle in which plaintiff's decedent was riding as a passenger, by registered mail, return receipt requested and receipt thereof duly acknowledged.

4. On August 19, 1959, this Court by Thomas C. Egan, J., signed an Order granting plaintiff's Motion for Judgment by default, directed the Clerk of the Court to note the default on the Docket of this case and Ordered the case on list for trial without jury for the assessment of damages.

5. Subsequently, the plaintiff and defendant through their counsel and with full authority of the beneficiaries of plaintiff's estate and the parties thereunto entitled, settled plaintiff's claim for the sum of Fifty Thousand Dollars ($50,000) and defendant gave plaintiff his judgment note therefor in his capacity as Administrator of the Estate of Donald Cionci, Deceased, a copy of which is attached hereto and marked Exhibit "A".

6. At the time of death of John R. Lynch, plaintiff's decedent, he was 31 years of age, in good health, and left to survive him his father, John Francis Lynch.

7. Following the accident on January 17, 1958, at approximately 4:45 P. M., the said John R. Lynch was taken to the Bryn Mawr Hospital and admitted in semi-coma having sustained multiple skull fractures, contusions and eventration of the brain, bilateral multiple fractures of the ribs with severe flail chest, laceration of the left hand and multiple abrasions, cut on left ankle and other injuries. Crani-[fol. 278] otomy was perform with removal of the skull fragments and debridement of the brain. Tracheotomy was also necessary. He also aspirated blood or gastric content. Post-operatively he continued to be comatose and showed signs of decerebration. Several days after he was hospitalized he became hypotensive with severe gastrointestinal hemorrhage. Blood pressure was maintained with difficulties on Levophed and blood transfusions. He died on February 4, 1958, eighteen days after the accident and admission.

8. The hospital bill at the Bryn Mawr Hospital for the period January 17, 1958 to February 4, 1958, totaled $1,621.74; the surgical bills totaled $1,000.00; nursing bills totaled $352.00; the funeral bill totaled $3,060.43 and the cost of the tombstone was $979.00 and estate administration expenses and taxes totaled $7,695.08.

9. The father of the decedent, John Francis Lynch, was dependent on him for maintenance and support.

10. Prior to his death John R. Lynch had been employed by an automobile dealer in Bryn Mawr earning approximately eighty dollars per week.

Wherefore, plaintiff moves this Court to approve the aforesaid settlement in the amount of $50,000 for the great pain and suffering of body and mind, the aforesaid medical, hospital and administration expenses herein set forth and the death of the decedent.

Bayard M. Graf, Avram G. Adler, J. Willison Smith, Jr., Attorneys for Plaintiff.

[fol. 279]

EXHIBIT "A" TO MOTION

$50,000 December 14, 1961

On demand after date I, George M. Patterson, Administrator of the Estate of Donald Cionci promise to pay to the order of Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, deceased. Fifty thousand and ..... no/100 Dollars.

And further, I do hereby authorize and empower the Prothonotary, Clerk of Court or any Attorney of any Court of Record of Pennsylvania, or elsewhere, to appear for and to confess Judgment against me solely in my capacity as Administrator of the Estate of John R. Lynch, deceased, for the above sum, as of any term, past, present or future, with or without declaration, with costs of suit, release of errors, without stay of execution, and with five percent added for collecting fees; and I also waive the right of inquisition on any real estate that may be levied upon to collect this note, and do hereby voluntarily condemn the same, and authorize the Prothonotary to enter upon the FI. FA. my said voluntary condemnation, and I further agree that said real estate may be sold on a FI. FA., and I hereby waive and release all relief from any and all appraisement, stay or

exemption laws of any State, now in force, or hereafter to be passed.

ESTATE OF DONALD CIONCI, DECEASED
GEORGE M. PATTERSON (SEAL)
Administrator

Witness,
STEPHEN K. SMITH

[fol. 280]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25149

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased,

vs.

GEORGE M. PATTERSON, Administrator of the Estate of Donald Cionci, Deceased, 414 Highland Avenue, Collingswood, New Jersey.

ORDER SUR MOTION FOR APPROVAL OF SETTLEMENT
(DOCUMENT No. 6)—November 20, 1962

And Now, November 20, 1962, after consideration of the hearing held November 15, 1962 (including exhibits marked at that hearing), the attached brief of plaintiff and statement of defendant, the attached copy of funeral bill dated 2/7/58, the Bryn Mawr Hospital Record covering the treatment of John R. Lynch from 1/17/58 to the time of his [fol. 281] death on 2/4/58, and the record, including the affidavit of November 15 (Document No. 7) and letter of that date, which has been attached to that affidavit, It Is Ordered that:

(A) The settlement described in the Motion For Approval of Settlement (Document No. 6) is Approved; and

(B) Two-fifths of any amounts received under the terms of such settlement shall be allocated as recovery under the Wrongful Death Act and three-fifths of any such amounts shall be allocated as recovery under the Survival Act.

Francis L. Van Dusen, J.

The following specific amounts mentioned in paragraph 8 on page 3 of the Motion are recoverable under the Wrongful Death Act and, hence shall be paid from the two-fifths allocable under that Act:

Hospital ($1,621.74), surgical ($1,000.) and nursing ($352.) bills	$2,973.74
Funeral bill (attached) and tombstone ($979.)	4,039.43

The affidavit of William H. Barwig (Document No. 7) makes clear that decedent's father, who survived him, received, and could have expected to receive, contributions from decedent as long as they both lived.

The Bryn Mawr Hospital Record contains this "Final Diagnosis":

> [fol. 282] "Depressed open fracture of skull
> Cerebral laceration & contusion
> Bilateral multiple rib fractures with 'flail chest'
> Gastrointestinal hemorrhage"

On admission to the hospital, Lynch was in a "semi-coma". On January 25, the record states he "reacts to pain dully". On January 26, his condition was the "same". On January 27, he took a turn "for worse" and appears to have been completely unconscious from that date until his death.

At the request of Lynn L. Detweiler, Esq., counsel for Lumbermen's Mutual Casualty Company, the hearing on this Motion was postponed from November 13, 1962, to November 15, 1962, so that Mr. Detweiler could present the views of his client in opposition to the Motion. See letter of November 9, 1962, marked as Exhibit C-1. (Notice that this hearing would be held on November 13 had been given to all counsel at the pre-trial conference in Civil Action

26455, which was held in September 1962.) Mr. Detweiler presented argument on behalf of his client at the hearing on November 15, 1962.

[fol. 283]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25149

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Administrator of the Estate of John R. Lynch, also known as John Roberts Lynch, Deceased,

vs.

GEORGE M. PATTERSON, Administrator of the Estate of Donald Cionci, Deceased, 414 Highland Avenue, Collingswood, New Jersey.

ORDER FOR JUDGMENT—December 21, 1962

And Now, to wit, this 21st day of December, 1962, upon motion of counsel for the Plaintiff herein, it is Ordered and Decreed that judgment having been previously entered by default, the amount of said judgment is now fixed at $50,000 with interest to run from October 17, 1962.

By the Court,

Van Dusen, J.

[fol. 284] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 285]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STIPULATION TO EXTEND TIME WITHIN WHICH APPELLANT MAY FILE BRIEF AND APPENDIX
(omitted in printing)

[fol. 310]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,589

(District Court Civil No. 26455)

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF JOHN R. LYNCH, also known as JOHN ROBERTS LYNCH, Deceased (plaintiff),

and

JOHN LANDIS HARRIS and SARAH B. SMITH, ADMINISTRATRIX OF THE ESTATE OF THOMAS W. SMITH, Deceased (Party Plaintiffs),

vs.

LUMBERMENS MUTUAL CASUALTY COMPANY and GEORGE M. PATTERSON, ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, Deceased,

LUMBERMENS MUTUAL CASUALTY COMPANY (defendant), Appellant.

Present: Kalodner, Chief Judge, and McLaughlin, Staley, Hastie, Ganey, Smith and Freedman, Circuit Judges.

ORDER SETTING CASE FOR ARGUMENT EN BANC—
March 15, 1966

It is Ordered that the above entitled case be set down for reargument before the court en banc, the date to be fixed by the clerk of the court.

By the Court,

Kalodner, Chief Judge.

[File endorsement omitted]

[fol. 311]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14589

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Administrator of the Estate of JOHN R. LYNCH, Also Known as JOHN ROBERTS LYNCH, Deceased (Plaintiff),

and

JOHN LANDIS HARRIS and SARAH B. SMITH, Administratrix of the Estate of THOMAS W. SMITH, Deceased (Party Plaintiffs),

v.

LUMBERMENS MUTUAL CASUALTY COMPANY and GEORGE M. PATTERSON, Administrator of the Estate of DONALD CIONCI, Deceased,

LUMBERMENS MUTUAL CASUALTY COMPANY (Defendant), Appellant.

Appeal From the United States District Court for the Eastern District of Pennsylvania.

Argued October 6, 1964
Before Kalodner, Ganey and Freedman, Circuit Judges.

Re-argued June 9, 1966
Before Staley, Chief Judge and McLaughlin, Kalodner, Hastie, Ganey, Smith and Freedman, Circuit Judges.

[File endorsement omitted]

OPINION OF THE COURT—Filed August 30, 1966

[fol. 312] By KALODNER, Circuit Judge

The instant declaratory judgment proceeding[1] was brought by Lynch's Estate[2] to determine whether the coverage of a public liability policy issued by the defendant, Lumbermens Mutual Casualty Company, to an owner of an automobile, one Edward S. Dutcher, extended to the deceased Donald Cionci, who was driving the car at the time it was involved in an accident. The policy by its terms extended its coverage to any person operating Dutcher's automobile with his permission at the time of the accident. The critical fact issue to be determined in the declaratory judgment action was whether the automobile was being operated by Cionci within the scope of the permission granted to him by Dutcher when it collided with a truck driven by one Thomas W. Smith. Smith, Cionci and John R. Lynch, who was riding with Cionci, were killed; John Landis Harris, who was also a passenger in the Cionci car, was injured.

Lynch's estate sued Cionci's estate in the District Court for the Eastern District of Pennsylvania in Civil Action No. 25149, seeking damages under the Pennsylvania Wrongful Death and Survival Statutes.[3] The defendant insurance company refused to defend Cionci's estate on the ground that Cionci had deviated beyond the use authorized

[1] The action is premised on Section 2201 of the Declaratory Judgment Act, 28 U.S.C.A. which provides in relevant part as follows:

> "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, *may declare the rights and other legal relations* of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a *final judgment or decree* and shall be reviewable as such." (emphasis supplied)

[2] For simplicity, the name of the representative of the Lynch Estate, namely, Provident Tradesmens Bank and Trust Company, is omitted.

[3] See 12 P.S. §§ 1601, 1602, Wrongful Death Act, and 20 P.S. § 320.601, Survival Act.

by Dutcher, viz., to drive from Bryn Mawr to Ardmore, some two miles southeast, provided he return in half an hour, whereas Cionci had instead driven some twelve miles in an opposite direction to Media. Lynch's estate obtained a default judgment against the Cionci estate and [fol. 313] then brought this declaratory judgment action against the insurance company. Damages allowed on the judgment were subsequently fixed at $50,000.

Smith's estate, which had brought suit against Dutcher and the Cionci and Lynch estates, in the Common Pleas Court of Delaware County, Pennsylvania, and Harris who had sued all three in the Delaware County Court, were joined as parties in the instant declaratory judgment action on Lumbermens' motion. *Dutcher was not joined.*

At the trial in the instant declaratory judgment action, the District Court ruled that Dutcher was incompetent to testify with reference to the scope of permission granted to use his car, under the Pennsylvania Dead Man's Act, 28 P.S. 322, as far as the Lynch and Smith estates were concerned, on the ground that his interest was adverse to that of the two estates because the coverage of the policy was limited and he had an interest in maintaining its coverage for his own protection in view of the pending actions against him in the state court. The District Court then directed verdicts in favor of the Cionci and Lynch estates since no evidence had been introduced to rebut the Pennsylvania presumption that a dead man operates a borrowed automobile within the scope of his permissive use. Dutcher was, however, permitted to testify in the Harris phase of the trial, and the jury found that Cionci had not deviated from his permitted use of the automobile.

Pursuant to the verdicts stated the District Court entered a judgment declaring that "Donald Cionci was driving the motor vehicle owned by Edward S. Dutcher and insured by the Lumbermens Mutual Casualty Company under its policy . . . with the permission of Edward S. Dutcher . . . ." and that Cionci "was an insured as defined in the policy".

On this appeal, Lumbermens contends that the trial judge erred (1) in ruling that Dutcher was incompetent under the Pennsylvania Dead Man's Act as a witness against the Cionci and Lynch estates and in directing [fol. 314] verdicts in favor of the Lynch and Smith estates; (2) in its instructions on the score of deviation in the Harris phase of the trial, and (3) "that it was impossible for the jury to consider the Harris case impartially when it had been directed to find against Lumbermens in the Lynch and Cionci cases."

We do not reach the contentions stated because in our view we are required to vacate the Judgment of the District Court and remand with directions to dismiss the instant action for these reasons:

First, there was a failure to join an indispensable party to this action, Dutcher, the named insured in Lumbermens' policy;

Second, the District Court erred in that in the appropriate exercise of its discretion it should have denied relief without consideration of the merits in view of the fact that two pending actions in a state court, earlier referred to, in which the here absent Dutcher, as well as the Cionci, Lynch and Smith estates, and Harris, were parties, presented the critical mooted question as to the coverage of Lumbermens' policy at issue in the instant declaratory judgment action.

It must immediately be noted that the issue as to whether there was a failure to join an indispensable party to the action—Dutcher—was not presented by Lumbermens to the District Court, nor did Lumbermens urge the District Court to deny relief in the appropriate exercise of its discretion for the reasons we have stated.

First, as to the indispensable party issue:

Lumbermens' policy was one of finite limits, undisclosed in the record as a result of the District Court's pre-trial ruling.

The District Court specifically held that the circumstance that the policy was one of finite limits made Dutcher's "interest" in the policy "adverse" to that of the plaintiff Lynch and Smith estates. It did so, in ruling that Dutcher was "incompetent" to testify for that reason under the Pennsylvania Dead Man's Act insofar as the [fol. 315] two estates were concerned. What the District Court held in that context is, of course, relevant in determining whether Dutcher was an indispensable party to the action under the indispensable party doctrine.

In its Opinion discussing its "incompetency" ruling the District Court said:

> "*The subject matter of this suit is the coverage of Lumbermens' policy issued to Dutcher. Depending upon the outcome of this trial, Dutcher may have the policy all to himself or he may have to share its coverage with the Cionci Estate,* thereby extending the availability of the proceeds of the policy to satisfy verdicts and judgments in favor of the two Estate plaintiffs. *Sharing the coverage of a policy of insurance with finite limits with another, and thereby making that policy available to claimants against the other person is immediately worth less than having the coverage of such policy available to Dutcher alone.* By the outcome in the instant case, to the extent that the two Estate plaintiffs will have the proceeds of the policy available to them in their claims against Cionci's estate, *Dutcher will lose a measure of protection.* Conversely, to the extent that the proceeds of this policy are not available to the two Estate plaintiffs *Dutcher will gain.* . . . It is sufficient for the purpose of determining adversity [of interest] that *it appears clearly that the measure of Dutcher's protection under this policy of insurance is dependent upon the outcome of this suit.* That being so, Dutcher's interest in these proceedings is adverse to the interest of the two Estate plaintiffs, the parties who represent, on this record,

the interests of the deceased persons in the matter in controversy." (emphasis supplied) 218 F. Supp. 802, 805-806 (E.D. Pa. 1963).

It has been settled for more than a century and a half that a party is indispensable when his rights may be affected and that a court "cannot proceed to a final decision [fol. 316] of the cause" until he is made a party. Russell v. Clark's Executors, 7 Cranch 69, 98 (1812).

The indispensable party doctrine is not procedural. It declares *substantive* law and accords a *substantive right* to a person to be joined as a party to an action when his interests or rights may be affected by its outcome. The indispensable party doctrine is beyond the reach of, and not affected by, Rule 19 of the Federal Rules of Civil Procedure, since the Rules, as later developed, cannot "abridge, enlarge or modify any *substantive right*". 28 U.S.C.A. § 2072 (emphasis supplied).

Time and again, in cases later discussed, federal courts have held that Rule 19 does not apply to the indispensable party doctrine. Indeed, as subsequently developed, Rule 19 specifically excludes from its sweep "indispensable parties", and Rule 12(b) in terms provides for dismissal of an action for "failure to join an indispensable party".

There is no precedent which affords nourishment to a contention that the indispensable party doctrine is nothing more than a procedural rule within the ambit of Rule 19.

It is true that several text writers have summarily treated the indispensable party doctrine as a procedural rule without considering whether it attains the proportion of substantive law. The existence of the threshold question as to whether the indispensable party doctrine is one of substantive law was, however, recently noted by Howard P. Fink, Research Associate, Yale Law School, in his article on "Indispensable Parties and the Proposed Amendment to Federal Rule 19."[4]

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[4] 74 Yale Law Journal 403, 430-431 (1965).

Exhaustive research has failed to yield a case in which the precise issue as to whether the indispensable party doctrine is one of substantive law has been raised or decided. However, Chief Judge Aldrich of the First Circuit in a recent case[5] noted *"the view that what are indispensable parties is a matter of substance, not of procedure."* (emphasis supplied)

[fol. 317] Our view that the indispensable party doctrine is *substantive law*, according a *substantive right* to an absent party to be joined when his interests may be "affected by the decree", is premised on Russell v. Clark, *supra*, and the cases which declared the doctrine to be a "settled rule of equity jurisprudence", and the absence of an affected party as "fatal error", which must be recognized *sua sponte* by a trial court.

In Mallow v. Hinde, 12 Wheat. 193 (1827), which distinguished and limited to its facts, Elmendorf v. Taylor, 10 Wheat. 152 (1825), the Court in holding absent parties indispensable, said at page 198:

> "In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. *The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.*" (emphasis supplied)
>
> "We do not put this case upon the ground of *jurisdiction, but upon a much broader ground.* . . . We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court." (emphasis supplied)

In 1853, in Northern Indiana Railroad Company v. Michigan Central Railroad Company, 15 How. 233, 246,

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[5] Stevens v. Loomis, 334 F.2d 775, 778, Note 7 (1 Cir. 1964).

the Court, upon its finding that "It is impossible to grant the relief prayed, without deeply affecting the New Albany Company [which had not been joined]," declared:

> ". . . in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, *the court must refuse to exer-* [fol. 318] *cise jurisdiction in the case,* or become the instrument of injustice." (emphasis supplied)

In 1854, this classic definition of an indispensable party was enunciated in the landmark case of Shields v. Barrow, 17 How. 130, at page 139:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either *affecting that interest,* or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (emphasis supplied)[6]

In 1870, it was ruled, in Hoe v. Wilson, 9 Wall. 501, that a court must *sua sponte* invoke the indispensable party issue even though it was not raised by a party.

There the Court said, at page 504:

> "No relief can be given in the case before us which will not seriously and permanently affect their rights

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[6] In 1868, in applying the *Shields* doctrine, in Barney v. Baltimore City, 6 Wall. 280, the Court, after defining indispensable parties as those *"whose interests* in the subject-matter of the suit, and *in the* relief sought, are *so bound up* with that of the other parties, that *their legal presence as parties* to the proceeding *is an absolute necessity,* without which the court cannot proceed," added this stricture:

> "In such cases *the court refuses to entertain the suit,* when these parties cannot be subjected to the jurisdiction". (emphasis supplied) (p. 284).

and interests. According to the settled rules of equity jurisprudence, the case cannot proceed without their presence before the court. The objection was not taken by the defendant, *but the court should, sua sponte, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made.*" (emphasis supplied)

In 1874, the indispensable party doctrine was admirably epitomized in Williams v. Bankhead, 19 Wall. 563, in this statement (p. 571):

[fol. 319] "Where a person will be directly affected by a decree, he is an indispensable party. . . ."

In the oft-quoted State of Washington v. United States, 87 F.2d 421 (9 Cir. 1936), there was enunciated what has now become landmark criteria in testing whether a party is indispensable, after it has been determined that he is interested.

The four-fold criteria there stated, at pages 427, 428, follows:

"(1) Is the interest of the absent party distinct and severable?

"(2) In the absence of such party, can the court render justice between the parties before it?

"(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?

"(4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

"If, after the court determines that an absent party is interested in the controversy, it finds that *all* of the four questions outlined above are answered in the

affirmative with respect to the absent party's interest, then such absent party is a *necessary party*. However, if *any* one of the four questions is answered in the *negative*, then *the absent party is indispensable.*" (emphasis supplied)

It is important to note, that in its discussion of the indispensable party question, the Court said, at pages 427, 428:

"In cases where there is error in nonjoinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as [fol. 320] 'jurisdictional'. The defect is not, properly speaking, a jurisdictional one. . . .

"The nonjoinder of an indispensable party is *fatal error*, and the court *cannot* proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder *would oust the court of jurisdiction.* Neither the statute [Act of March 3, 1911, ch. 231 § 50, 36 Stat. 1101] nor the equity rule [Rule 39 of the Equity Rules of 1912, 28 U.S.C.A. following section 723], . . . permit the court to proceed in the absence of an indispensable party." (emphasis supplied)

The indispensable party doctrine as declared in *Shields* and *State of Washington* was applied in Commonwealth Trust Company v. Smith, 266 U.S. 152 (1924) and Niles-Bement-Pond Company v. Iron Moulders Union, Local No. 68, 254 U.S. 77 (1920).

This court has time and again likewise done so.

In Samuel Goldwyn, Inc. v. United Artists Corporation, 113 F.2d 703 (1940), we held that an absent party is indispensable if his interest is "joint" with that of either plaintiff or defendant, and that the doctrine applies to declaratory judgment actions.

In Baird v. Peoples Bank & Trust Co. of Westfield, 120 F.2d 1001 (1941), we specifically held, citing *Shields* and *State of Washington,* that an absent party is indispensable, "if the decree will have an *injurious* effect upon his interest." We there affirmed the District Court's dismissal of a complaint in an action brought by life tenants insofar as it related to the corpus of a trust fund, for failure to join remaindermen who were found to be indispensable parties.

In United States v. Washington Institute of Technology, Inc., 138 F.2d 25 (1943), in affirming the District Court's dismissal of an action for nonjoinder of an indispensable party, we ruled that the requirement in Rule 19(a) that [fol. 321] those who have a "joint interest" must be joined referred to parties who were "indispensable" prior to the Rule.

In doing so we said at pages 25-26:

> "Rule 19(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, requires that those having 'a joint interest shall be made parties. . . .' *This means those who were indispensable parties prior to the rules.* 2 Moore's Federal Practice (1938) § 19.02. As described in the leading case upon the matter, *they were persons who had such an interest that any final decree rendered had to affect that interest.* Shields v. Barrow, 1854, 17 How. 130, 15 L. Ed. 158." (emphasis supplied)

In Chidester v. City of Newark, 162 F.2d 598 (1947), we again declared (p. 600):

> ". . . *indispensable parties under Rule 19 are those who were indispensable prior to the rules;* they have such an interest in the controversy that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience." (emphasis supplied)

And, in Hook v. Hook & Ackerman, 187 F.2d 52 (1951), we stated in note 7, page 60:

> "Rule 19(a) uses the term 'joint interest', stating that those having such an interest 'must' be joined. *This provision applies to parties who were indispensable under the previous practice.*" (emphasis supplied)

The courts of appeals in other circuits have in recent years attested to the continuing unimpaired vitality of the indispensable party doctrine as declared in *Shields* and [fol. 322] the Supreme Court cases which preceded and followed it.

In 1964, the First Circuit, in Stevens v. Loomis, 334 F.2d 775, declared (p. 777): *"where the interests of the absent party are inextricably tied in to the cause"* he is a *"true indispensable party"*, and "A court *cannot proceed* in the absence of an indispensable party."[7] (emphasis supplied)

Again, in 1964, the Fifth Circuit, in Hilton v. The Atlantic Refining Company, 327 F.2d 217, in citing and applying *Shields* and *Mallow* v. *Hinde, supra,* declared (p. 218):

> *"An indispensable party is one whose relationship to the matter in controversy in a suit in equity is such that no effective decree can be entered without affecting his rights."* (emphasis supplied)

In 1961, the Ninth Circuit, in Stumpf v. Fidelity Gas Co., 294 F.2d 886, in holding that absent parties were not there indispensable because, inter alia, the judgment sought in the action *"would have no injurious effect upon the interest of any absent party"*, applied the criteria for testing whether an absent party is indispensable which had been laid down in *State of Washington* v. *United States, supra.* (emphasis supplied)

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[7] In *Stevens* it was held that the absent party was only a "necessary" party because it was not within the "classic definition of an indispensable party."

In 1960, the indispensable party doctrine was applied, in a situation strikingly analogous in critical respects to that prevailing here, in United States v. Fried, 183 F. Supp. 371 (E.D. N.Y.).[8] Fried was insured under eight life insurance policies of the New York Life Insurance Company. The United States, which had an income tax lien against Fried, brought an action against him and the insurance company seeking a judgment directing the insurer to pay to the government the cash surrender value of three of [fol. 323] the policies and the disability benefits due Fried under the five other policies. One Ilene Fried was the named beneficiary in the eight policies. Fried had reserved in the policies the right to receive their cash surrender value and to change his beneficiary. The District Court, nevertheless, held that the beneficiary was an indispensable party under *Shields*, stating at page 373:

> "The granting of the Government's prayer for relief *will either diminish or completely extinguish her rights as beneficiary. It is apparent, therefore,* that the case at bar is governed by the rule of Shields v. Barrow, supra, and *that the beneficiary is an indispensable party to this action."*[9] (emphasis supplied)

It must also be noted that it has been held (1) "there is a complete identity of interest as between the insurance carrier and the insured" under an automobile liability insurance policy of the type involved in the instant case, Fireman's Fund Insurance Company v. Dunlap, 317 F.2d 443, 446 (4 Cir. 1963); and (2) since "The interests of the insurer and insured are identical" their "interests" are "joint": State Farm Mut. Automobile Ins. Co. v. Hugee, 115 F.2d 298, 302 (4 Cir. 1940).

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[8] Aff'd on other grounds, 309 F.2d 851 (2 Cir. 1962).

[9] The District Court in that case ordered the dismissal of the complaint should the government fail to join the beneficiary as a party defendant.

What has been said establishes that under settled law, it was mandatory upon the District Court *not* to proceed to a decree in this action in view of the fact that its finding as to the action's potential drastic effect upon Dutcher made him an indispensable party.

The distilled essence of the cases discussed is that one whose interests or rights will be adversely affected by the outcome of an action has a *substantive* right to be joined as a party, and that the right forecloses a trial court from proceeding "to a final decision of the cause" until he is joined as a party.

"Equitable principles", standing alone, cannot be recruited to thwart or avoid the impact of the indispensable [fol. 324] party doctrine where "a decree will have an injurious effect upon the interest" of an absent party. Equitable considerations are an element of the criteria to be applied in determining whether a party is indispensable but they are not operative where the element of "injurious effect on the interest of the absent party" is present. *State of Washington* v. *United States, supra.*

A declaratory judgment proceeding cannot be viewed as an action "equitable in nature". It was settled by Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 240-241 (1937) that "the operation of the Declaratory Judgment Act *is procedural only*" and that the Act was designed to afford "an immediate and definitive determination of *the legal rights of the parties.*" (emphasis supplied)

The *"procedural limitations"* of the Declaratory Judgment Act were re-asserted in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672 (1950).

The cases cited in support of the view that (1) a declaratory judgment proceeding "is equitable in nature", and (2) "equitable principles" prevail in the determination of the fact whether an absent party is "indispensable", afford neither support nor nourishment to that view.

Neither A. L. Mechling Barge Lines, Inc., 368 U.S. 324 (1961), nor Brillhart v. Excess Insurance Company, 316

U.S. 491 (1961), cited in support of the first point, even remotely suggest that declaratory judgment proceedings are "equitable in nature."

Three other cases, subsequently discussed, cited in support of the second point are inapposite on their facts. First and foremost, all three were *actions in equity* and not declaratory judgment proceedings; second, in two equitable relief was granted on express findings that such relief would *not* "injuriously affect the interest" of an absent party, and in the third, relief was denied for the reason that absent parties were "indispensable" because their interests would be affected.

[fol. 325] In Payne v. Hook, 7 Wall. 425 (1868) it was merely held that an heir could sue the administrator of her brother's estate for alleged misconduct without joining other heirs since the trial court could have proceeded to a decree "without injury" to the absent heirs, because "the controversy is not with them, but with the administrator and his sureties", and further, the absent heirs would in fact reap the benefits of the action.

There is nothing in *Payne* which justifies its citation as a flexible and imaginative adaptation of remedies in disregard of the indispensable party doctrine, or as a "relaxation" of that doctrine.

Nor does Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), justify its citation as an instance of a "relaxation" of the indispensable party doctrine. There, the Supreme Court only held that it would not grant a motion to be formally joined as a party to a pending appeal because the movant "has been permitted as *amicus* to brief and argue its position before this Court", and "In these circumstances we are not persuaded that the admission of C.A.V. [the movant] as a party is necessary *at this stage* to safeguard any claim either that it has already presented or that it may present in the future course of this litigation". (emphasis supplied)

Similarly, in Waterman v. Canal-Louisiana Bank & Trust Company, 215 U.S. 33 (1909) where a *bill in equity* sought to determine the interest of an heir in an alleged lapsed legacy and the consequent increase in the residuary estate, it was held that an absent nonresident heir could not be regarded as an indispensable party whose absence would defeat the jurisdiction of a court in equity, because the decree sought could be entered "without prejudice to the rights" of the absent heir.

In so holding the Court said (p. 49):

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually be- [fol. 326] fore the court *without injuriously affecting the rights of such absent party.*
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> "If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. . . .
>
> " . . . while Davis [the absent heir] is a necessary party, in the sense that he has an interest in the controversy, his interest is not that of an indispensable party, without whose presence a court of equity cannot do justice between the parties before it, *and whose interest must be so affected by any decree to be rendered as to oust the jurisdiction of the court*". (emphasis supplied)

In Roos v. Texas Co., 23 F.2d 171 (2 Cir. 1927), cert. den. 277 U.S. 587 (1928), also cited, the Court affirmed the District Court's dismissal of a *bill in equity* which sought an accounting, *on the ground of absence of indispensable parties* whose interests would be affected by the outcome of the action.

In doing so, Judge Learned Hand, speaking for the Court, said (p. 173):

> " . . . the case appears to us to be one *where the rights of the beneficiaries* [in proceeds of a lease] *are so entangled with one another that it is practically impossible in the decree to protect those who are absent. They are indispensable to any dealing with the case at all.*" (emphasis supplied)

There is nothing in Judge Hand's opinion which affords an iota of support for the view that he considered the feasibility of fashioning a decree adequate to preserve an attorneys' lien so that the suit might proceed notwithstanding their absence as parties. The fact of the matter is that Judge Hand *rejected* the notion that a decree could [fol. 327] be entered impounding proceeds of the lease, on the ground that such action would be "in substance a denial of any relief at all."

As in *Roos* v. *Texas, supra,* the instant case is "one where the rights" asserted by those seeking recourse to the benefits of Dutcher's policy, and Dutcher's rights to the protection accorded to him by the policy, "are so entangled with one another that it is *practically impossible in the decree to protect those who are absent* [Dutcher]" and he is, accordingly, "*indispensable to any dealing with the case at all.*" (emphasis supplied)

Coming now to the minority's view that the indispensable party doctrine is nothing more than a "procedural rule", within the ambit of Rule 19 of the Federal Rules:

It must immediately be observed, on this score, that the minority has failed to note that Rule 12(b)(7) provides in explicit terms that a claim must be dismissed for "failure to join an indispensable party",[10] and that Rule 19, in

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[10] Rule 12(b) provides in relevant part:

> "Every defense . . . to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (7) failure to join an indispensable party."

terms, relates only to "necessary parties" and specifically excludes from its sweep "indispensable parties".[11]

Rules 12 and 19 preserve rights accorded by the indispensable party doctrine. They afford no basis for the view that Rule 19 may be resorted to in determining whether there has been a failure to join an indispensable party.

It was squarely held in Calcote v. Texas Pac. Coal & Oil Co., 157 F.2d 216 (5 Cir. 1946), cert. den. 329 U.S. 782, that Rule 19 does not apply to indispensable parties. [fol. 328] It was there said (p. 219):

> "Section 50 of the Judicial Code [Act of March 3, 1911, c.2317] and *rule 19(b)* of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, *do not apply to indispensable parties,* who must be made parties to the suit even though this will defeat federal jurisdiction". (emphasis supplied)

Further, the Court in denying a petition for rehearing said (p. 225):

> " . . . every indispensable party must be brought into court, actually or constructively, or the suit will be dismissed if a substantial claim is stated in the complaint. It is axiomatic that indispensable parties cannot be dispensed with in diversity cases even though their presence will defeat federal jurisdiction."

The Court's citation, in *Calcotte* in note 3 page 225, of Dobie on Federal Procedure is of critical relevance in view of the fact that Judge Dobie therein specifically declared that both Section 50 of the Judicial Code and Equity Rule

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[11] Rule 19, captioned "Necessary Joinder of Parties", provides in relevant part, in sub-division (b):

> "Effect of Failure to Join:
>
> "When persons who are not indispensable. . . ."

39, *predecessor of Rule 19 of the Federal Rules,* "do not apply to indispensable parties."

At pages 217-218 of his admirable treatise, Judge Dobie said:

> "An indispensable party is one without whom the suit cannot proceed, one in whose absence the court could not enter a decree. His relation to the suit is so direct and vital that without him no adequate decree could be entered, determining the rights of other parties. Even in his absence, any decree would affect his interest. It is therefore clear that such parties must of necessity be before the court. *Accordingly, section 50 of the Judicial Code (28 USCA § 111) and equity rule 39 do not apply to indispensable parties, who must be parties to the suit, even though this will defeat the federal* [fol. 329] *jurisdiction. There can be no dispensing with indispensable parties.*
>
> "Thus if A, B, and C each separately claim all of an entire fund, they are all indispensable parties to a suit concerning the disposition of the fund; for an award of any part of the fund to one is necessarily a decision, as to this part, against the other two." (emphasis supplied)

In Young v. Powell, 179 F.2d 147 (5 Cir. 1950), cert. den. 339 U.S. 948, it was held that Rule 19 requires dismissal of an action where an indispensable party has not been joined.

The view that Rule 19 sets the standard by which the existence of an indispensable party may be determined was specifically rejected in Stumpf v. Fidelity Gas Co., 294 F.2d 886 (9 Cir. 1961).

There the Court said (p. 890):

> "This brings us to the question whether the omitted parties here are indispensable within the meaning of the term and as defined in the adjudicated cases.

> It is not sufficient for a defendant to demonstrate that these persons would be 'proper' or 'necessary' parties within the meaning of Rule 19, F.R. Civ. P., 28 U.S. C.A. *Those rules were not intended to and did not effect any alteration in the standards by which the existence of an indispensable party may be determined.*" (emphasis supplied)

Rule 19 does not, and cannot, effect any alteration, either by way of modification or extension, in the standards by which the existence of an indispensable party may be determined.

The Rule neither "giveth nor taketh away" the *substantive* right of an absent party whose interest may be directly affected by a judgment to be joined as a party to the action. The federal statute enabling the Supreme [fol. 330] Court to promulgate the Rules of Civil Procedure commands that *"Such rules shall not abridge, enlarge or modify any substantive right."* [12] (emphasis supplied)

The principle that rules of federal practice do not apply to indispensable parties was first declared in *Shields*. It was there said at 17 How. 139:

> "*Neither the Act of Congress* of February 28, 1839, 5 Stat. at L. 321, sec. 1, *nor the 47th rule for the equity practice of the circuit courts of the United States, enables a circuit court to make a decree in equity, in the*

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[12] The enabling Act of June 19, 1934, as amended, 28 U.S.C.A. § 2072, provides in relevant part:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

absence of an indispensable party, whose rights must necessarily be affected by such a decree." (emphasis supplied)

And at pages 141-142 it was said:

"So that, while this Act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned [Mallow v. Hinde, 12 Wh. 198]. And the 47th rule is only a declaration for the government of practitioners and courts, of the effect of this Act of Congress, and of the previous decisions of the court, on the subject of that rule. Hagan v. Walker, 14 How. 36. *It remains true, notwithstanding the Act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person,* that [fol. 331] complete and final justice cannot be done between the parties to the suit without affecting those rights." (emphasis supplied)

The leading case of *State of Washington* v. *United States, supra,* held to the same effect, stating at 87 F.2d 428:

"Neither the statute nor the equity rule . . . permit the court to proceed in the absence of an indispensable party."

That rules of practice cannot "abrogate or modify the substantive law" was declared in Washington-Southern Navigation Company v. Baltimore & Philadelphia Steamboat Company, 263 U.S. 629 (1924). There, the Court was asked to construe the sweep of Rule 50 of the then new Admiralty Rules, promulgated in 1920.

Mr. Justice Brandeis, speaking for the Court, said (pp. 635-636):

> "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. . . . But no rule of court can enlarge or restrict jurisdiction. *Nor can a rule abrogate or modify the substantive law.* This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred." (emphasis supplied)

The present Federal Rules of Civil Procedure, promulgated by the Supreme Court under the authority of [fol. 332] the Act of June 19, 1934,[13] and its subsequent amendments,[14] are restricted in their operation to matters of pleading and procedure and they "do not modify, abridge or enlarge substantive rights."

The Supreme Court has so held in Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1941) and United States v. Sherwood, 312 U.S. 584 (1941).

In *Sibbach* the Court said at pages 7 and 8:

> "The Rules of Civil Procedure were promulgated under the authority of the Act of June 19, 1934, which is:
>
> "'Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United

[13] 48 Stat. 1064, 28 U.S.C.A. § 723b.

[14] 28 U.S.C.A. § 2072.

States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. . . .'"

and at page 10:

"Hence *we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction.* The first is that *the court shall not 'abridge, enlarge, nor modify substantive rights,' in the guise of regulating procedure.*" (emphasis supplied)

In *United States* v. *Sherwood, supra,* the Court said (pp. 589-90):

"An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; *and the Act* [fol. 333] *of June* 19, 1934, 48 Stat. 1064, 28 U.S.C. 723b, *authorizing this Court to prescribe rules of procedure* in civil actions *gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.*" (emphasis supplied)

In Perry v. Allen, 239 F.2d 107 (5 Cir. 1956), it was held that the then existing provision in Rule 25(a) (1) F.R.C.P. requiring substitution within two years after the death of a party "is invalid insofar as it attempts *to abridge appellant's substantive right* to bring his civil action to trial on its merits, by placing a categorical and inflexible time limit upon his right to substitute the collector's administrator." (emphasis supplied) (p. 112).

The Court prefaced its holding with this statement (pp. 111-112):

> "It is plain that these Rules are designed to provide the machinery for the administration of justice, the modes of proceeding by which legal rights are enforced; and *do not purport to deal with the law which gives or defines such rights, or their character, or the existence or boundaries of the remedies vouchsafed for the establishment of those rights. . . .*" (emphasis supplied)

It may be noted parenthetically that the condemned provision in Rule 25(a)(1), requiring substitution within two years after the death of a party, was deleted in 1963 by amendment.

The "procedural nature" of the Federal Rules of Civil Procedure, and their sterility with respect to *matters of substantive right* was noted in United States v. United States Casualty Company, 218 F. Supp. 653 (D. Del. 1962). It was there said (p. 656):

> "First, the suit, of course, is filed pursuant to the Federal Rules of Civil Procedure. *Those Rules, as* [fol. 334] *the name indicates, are of a procedural nature, leaving matters of substantive right to be otherwise determined.*" (emphasis supplied)

These final observations are in order in concluding discussion of the indispensable party issue:

The command of the indispensable party doctrine that a "court cannot proceed to a final decision" where an absent party "may be so much affected by the decree" [15] is bare of "ifs, ands, and buts" and it has been given effect in more than three hundred cases in federal and state courts.

Coming now, and as briefly as possible, to our view that the District Court should have denied relief by way of declaratory judgment, without consideration of the merits,

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[15] Russell v. Clark's Executors, 7 Cranch 69, 98 (1812).

in the appropriate exercise of its discretion, since two pending actions in a state court, in which Dutcher and all the persons involved in the accident were parties, presented the mooted question as to the coverage of the policy.

At the time the instant declaratory judgment proceeding came to trial there had been pending for almost two years in the Common Pleas Court of Delaware County, two actions arising out of the collision between Dutcher's car and a truck operated by Smith. In one, the Smith estate sued Dutcher and the Lynch and Cionci estates; in the other, Harris sued them. The complaint in each action alleged that Cionci was driving at the time of the accident with Dutcher's permission and on his business and that Cionci was under Lynch's "control".

Since Cionci's estate was admittedly insolvent, Smith's estate and Harris, if they succeeded in obtaining verdicts against it, could only realize on their verdicts if the coverage of Dutcher's policy extended to Cionci. And of course, any verdicts they obtained against Dutcher would also involve recourse to the protection of his policy.

The Delaware County court in trying the two actions would have been required, as was the District Court, to [fol. 335] rule on the question as to whether the Pennsylvania Dead Man's Rule would operate to bar Dutcher from testifying with respect to the scope of the permission which he had granted to Cionci and/or Lynch for the use of his car. The dimensions of the problem attending resolution of this question are attested to by the fact that District Judge Van Dusen, in the pre-trial stages of the instant action, held that the Dead Man's Rule did not preclude Dutcher's testimony while District Judge Luongo, who presided at the trial, ruled to the contrary.

It may be noted parenthetically that Dutcher, Cionci, Lynch, Smith and Harris were by coincidence all residents of Bryn Mawr, Pennsylvania, near the scene of the accident.

The considerations stated inescapably lead to the conclusion that the District Court erred in disregarding them,

and in failing to dismiss the declaratory judgment action by reason of their existence. We are charged with the duty to rule on the issue as to whether the District Court abused its discretion even though it failed to recognize that the question of exercise of discretion was presented by the facts. As was said in *A. L. Mechling Barge Lines, Inc.* v. *United States, supra* at page 331:

> "Declaratory judgment is a remedy committed to judicial discretion. *Nor need this Court first have the view of a lower court before it may decide that such discretion ought not be exercised.*" (emphasis supplied)

The Supreme Court has laid down these guide-lines with respect to a district court's exercise of discretion in a declaratory judgment action:

> *"Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law."* Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237, 248 (1952) (emphasis supplied)
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> * * * * * * *
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> [fol. 336] "Where a District Court is presented with a claim such as was made here [to declare rights under an insurance policy], *it should ascertain whether the questions in controversy* between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, *can better be settled in the proceeding pending in the state court.* This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. *The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.*" Brillhart, Administrator v. Excess Insurance Company of America, 316 U.S. 491, 495 (1942) (emphasis supplied)

The stated guide-lines were applied in Doby v. Brown, 232 F.2d 504 (4 Cir. 1956), where the dismissal of a declaratory judgment action was affirmed. There the late Chief Judge Parker, speaking for the Court, said at page 506:

> "In so far as the suit asked a declaratory judgment, and plaintiffs' brief in this court asserts that it was instituted under the Declaratory Judgments Act, 28 U.S.C. § 2201, *it is well settled that the granting of declaratory relief is a matter resting in the sound discretion of the trial judge and that it ought not be exercised to try a case piecemeal or to drag into the federal courts matters properly triable before the courts of the state.*" (emphasis supplied)

In the instant case the District Court did not give effect to the guide-lines established in the foregoing cases and improvidently exercised its discretion in failing to deny relief without consideration of the merits.

For that reason, and the further reason that there was a failure to join an indispensable party to this action—[fol. 337] Dutcher, the named insured in Lumbermens' policy—the Judgment of the District Court will be vacated and the cause remanded with directions to dismiss the action.[16]

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[16] This, too, must be said with respect to the minority's view that the interests of Dutcher—the absent indispensable party—can be "protected" by fashioning a decree which would stay the execution of the District Court's present declaratory judgment until Dutcher shall have had a full opportunity, either in the District Court or in a state court, to present any claims he may have to the protection of Lumbermens' policy as a result of the determination of the state court actions against him:

A declaratory judgment under Section 2201 must be of a *"conclusive character"* and *"an immediate and definitive determination of the legal rights of the parties"*. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937). It must *settle legal rights* and *remove uncertainty and insecurity from legal relationships"* and *"it should not be accorded . . . to try a controversy by piecemeal,*

FREEDMAN, Circuit Judge, dissenting.

I dissent because I believe we can preserve the jury's determination of the factual issue whether Cionci was driving Dutcher's automobile within the limits of his permission. To speak of the discretionary power of a trial [fol. 338] judge to refuse to entertain a declaratory judgment proceeding, therefore, is unreal where the case already has been tried and decided. The question now is not whether the case should have been heard, but rather whether the factual decision which has already been made should now be cast aside and the parties required to re-

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or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted." Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321, 325 (4 Cir. 1937). (emphasis supplied)

The suggested decree not only fails to conclusively and definitely determine and settle the legal rights of the parties to this action, and "remove uncertainty and insecurity from legal relationships", but it *specifically* makes legal rights and legal relationships of the parties contingent and conditional upon events still to transpire, viz., the unpredictable future outcome (1) of the pending actions in the state court brought by the Smith estate and Harris against the Lynch and Cionci estates, and the here absent Dutcher, and (2) any further proceeding in the District Court in which Dutcher should present his claims to the protection of Lumbermens' policy.

The suggested decree not only transgresses the permissible limits of the Declaratory Judgment Act and offends its design, but its conditional and contingent provisions are "in substance a denial of any relief at all [to the plaintiffs]," as was said by Judge Learned Hand in Roos v. Texas Co., 23 F.2d 171, 173 (2 Cir. 1927), cert. den. 277 U.S. 587 (1928), in refusing to enter the there suggested decree.

As was well said in Doehler Metal Furniture Co. v. Warren, 129 F.2d 43 (D.C. Cir. 1942), cert. den. 317 U.S. 663, at page 46:

> "The giving of a declaratory judgment in this case would be in effect an unwarranted enlargement of the District Court's jurisdiction. . . . *It is well enough to be attuned to the use of new remedial concepts, but it is something else to increase jurisdiction beyond the other provisions of law by a clever use of remedies.*" (emphasis supplied)

litigate what has been fairly decided. I believe the second ground for dismissal of the action, that Dutcher is an indispensable party, is a mistaken one, violates the Supreme Court's recently promulgated new Rule 19 and unjustifiably puts its validity in question.

Although on the surface the case appears to be one of simple automobile liability coverage, it has assumed significant proportions as a result of the majority's views. It is therefore necessary that I fully express the reasons for my dissent.

I.

Dutcher's Non-joinder as a Party.

The majority holds that Dutcher's absence as a party is a "jurisdictional" defect which requires the automatic dismissal of the action, even though it was not asserted by the parties but was raised by us on appeal. I shall consider the problem first as it existed when the case was argued and reargued before us, prior to July 1, 1966, the effective date of the recent amendments to the Federal Rules of Civil Procedure, and then discuss the effect of the amendments.

The old Rule 19 dealing with the necessary joinder of parties was a procedural provision for the administration of the long-standing judicially established principles developed in the case law which marked out the occasions when a case should proceed despite the absence of an interested person. The body of the doctrine was found in the precedents by which it had developed and the procedure for its administration was provided by the old Rule 19. [fol. 339] The requirement of joinder originated in equity practice[1] where the presence of all "indispensable" parties

[1] See 2 Barron & Holtzoff, Federal Practice & Procedure (Wright ed. 1961), §511; 3 Moore's Federal Practice (2d ed. 1963), ¶¶ 19.05, 19.19. See also Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254 (1961).

was considered necessary so that complete justice might be done. *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1854); *Hoe* v. *Wilson*, 76 U.S. (9 Wall.) 501, 504 (1869).[2] In *Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 166-67 (1825), where plaintiff, a tenant in common with others, was permitted to sue in equity without making his co-tenants parties to the suit, Chief Justice Marshall said: "Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the Court itself, and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which turns the party out of Court, because it has no jurisdiction over his cause; but, being introduced by the Court itself, for the purpose of justice, is susceptible of modification for the promotion of those purposes." This statement was quoted in substantial part and reaffirmed in *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 193, 197 (1827).

From the earliest times courts have been guided in determining indispensability by practical considerations.[3] The decision whether a person is indispensable therefore depends upon a consideration of all the elements which bear on the justice of requiring joinder in the circumstances of the particular case, or to speak in more familiar terms, upon equitable principles. The label "indispensable party" therefore has always been in truth more a statement of

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[2] See Parker Rust-Proof Co. v. Western Union Telegraph Co., 105 F.2d 976 (2 Cir. 1939); Benger Laboratories, Ltd. v. R. K. Laros Co., Inc., 24 F.R.D. 450 (E.D.Pa. 1959), on merits, 209 F.Supp. 639 (E.D.Pa. 1962), affirmed, 317 F.2d 455 (3 Cir. 1963), cert. denied, 375 U.S. 833 (1963). See also Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957).

[3] For this reason suits against subordinate officials, without joinder of the superior, have been sustained. See Shaughnessy v. Pedreiro, 349 U.S. 48, 54 (1955).

[fol. 340] result than of cause,[4] since the elements which are decisive of indispensability are also those which go to determine whether the suit should proceed in the absence of the interested person.

The equitable considerations governing the determination of indispensability were classically stated in *Shields* v. *Barrow, supra*: "Persons [are indispensable] who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. . . ." (58 U.S. (17 How.), at 139).

As the doctrine of *Shields* v. *Barrow, supra,* has developed, equitable considerations have been paramount. If it is possible to render an effectual judgment between those who are present as parties to the action without a substantial adverse effect on the rights of the absent person, the action will not be dismissed. This principle has led the courts to mould their decisions by flexible and imaginative adaptation of remedies in order to avoid either the dismissal of a suit or the imposition of an adverse effect on the absent person.[5] It follows that indispensability is not

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[4] Reed, supra, n. 2, at 346. Fink, Indispensable Parties and the Proposed Amendment to Federal Rule 19, 74 Yale L.J. 403, 415 (1965), while criticizing the then proposed amendment, agrees with the need to look to practical considerations in determining whether an absent person is indispensable. See also infra, n. 16.

[5] In Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868), a next of kin of a deceased intestate sued the public administrator of the estate, seeking an accounting and the payment of her true share of the estate. Although other distributees were not made parties, the court reversed the dismissal of the complaint, saying that the general rule requiring the joinder of all persons materially interested in the subject matter of the suit "will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. . . ." (p. 431). The court directed that the suit should proceed on the ground that

[fol. 341] determined by an academic or mechanical classification of the absent person. The decision depends rather on all of the elements which bear on the particular case.

A number of cases have already been decided in which the insured was not treated as indispensable in an action between the tort claimant and the insurer.[6] In the circumstances which surround the present proceeding, the interests of justice call strongly for the preservation of the jury verdict. In the absence of a conflicting claim by Dutcher to his own protection under the policy, which has fixed limits,[7] he will not be injured in any way by a judgment that the insurer will be liable for any judgments obtained against Cionci. And in the event that the aggregate recov-

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if it terminated in a decree against the defendants substantial justice would be done to all the parties in interest and a multiplicity of suits prevented by allowing the other distributees to come in and share in the benefits of the litigation, either through a reference to a master or in other appropriate proceedings. (p. 432).

In Roos v. Texas Co., 23 F.2d 171 (2 Cir. 1927), Judge L. Hand considered the feasibility of fashioning a decree adequate to preserve an attorneys' lien so that the suit might proceed notwithstanding their absence as parties, but concluded that no decree would adequately do so.

See also Mallow v. Hinde, 25 U.S. (12 Wheat.) 193, 198-99 (1827); Russell v. Clark's Executors, 11 U.S. (7 Cranch) 69, 98 (1812).

[6] Northwest Cas. Co. v. Kirkman, 119 F.Supp. 828 (M.D.N.C. 1954); Ohio Casualty Ins. Co. v. Maloney, 44 F.Supp. 312 (E.D. Pa. 1942); Nationwide Mutual Ins. Co. v. Simms, 231 F.Supp. 787, 792 (D.Md. 1964); Glen Falls Indemnity Co. v. Fredericksen, 8 F.R.D. 55 (D.Neb. 1947); Congregation Ahavath Achim v. Underwriters At Lloyd's of London, 31 F.R.D. 275 (D.Ore. 1962). See also Western Casualty & Surety Co. v. Beverforden, 93 F.2d 166 (8 Cir. 1937), holding driver-tortfeasor not indispensable.

[7] In the pretrial proceedings the court ordered that Lumbermens need not reveal the policy limits, although it was required to state whether they equalled or exceeded $10,000 so as to determine whether the jurisdictional amount was met. The jurisdictional amount was then acknowledged. The undisclosed policy limits are fixed, for the policy provides that the "inclusion herein of more than one insured shall not operate to increase the limits of the company's liability".

eries against Cionci's estate and Dutcher should exceed the policy limits so that their interests would come into collision, Dutcher would have the right at that time to make his claim of superiority over Cionci's estate to indemnity from the fund created by the policy. In making such claim he would be free to litigate the question whether Cionci was driving with his permission at the time of the accident; since he is not a party he will not be foreclosed by collateral estoppel.[8] In any event a race to collect [fol. 342] against the fund can readily be guarded against by a provision in the decree that Lumbermens shall not be required to make any payment under the policy until Dutcher has had an opportunity to present any claims he may have as a result of the determination of the state court

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[8] Under Pennsylvania law, which determines the scope of collateral estoppel (see Hartmann v. Time, Inc., 166 F.2d 127, 138 (3 Cir. 1947), cert. denied, 334 U.S. 838 (1948), Boulter v. Commercial Standard Ins. Co., 175 F.2d 763, 768 (9 Cir. 1949)), Dutcher's mere appearance as a witness is not enough to have him treated as in substance a party. Woodburn v. Pennsylvania Railroad Co., 294 Pa. 174 (1928). Nor is he in privity with Lumbermens, for Lumbermens has no interest beyond the amount of its policy, while Dutcher's real interest is precisely in the excess judgment, which alone would provide the occasion for his relitigation of the issue of Cionci's coverage. The relationship of Dutcher and Lumbermens is analogous to that of indemnitee and indemnitor, in which the indemnitee is not bound by a third party's judgment against the indemnitor even though the indemnitor would be bound by a judgment against the indemnitee. See Restatement of Judgments, § 107(b), comment k. And, of course, the fact that Dutcher would have been entitled to the benefit of the judgment in this action if it had been in favor of Lumbermens (see Hinchey v. Sellers, 7 N.Y. 2d 287, 165 N.E. 2d 156 (1959)), will not bind him to a judgment which went the other way. For in the former instance, as we said, in Makariw v. Rinard, 336 F.2d 333, 335 (3 Cir. 1964), "the party foreclosed has litigated the critical issue. . . ." See also Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 33-4 (1957), cert. denied, 355 U.S. 832 (1957); Bernhard v. Bank of America Nat'l. Trust & Sav. Ass'n., 19 Cal. 2d 807, 122 P.2d 892 (1942); Bruszewski v. United States, 181 F.2d 419 (3 Cir. 1950), cert. denied, 340 U.S. 865 (1950).

actions.[9] This would only make express what is implicit in the refusal of the court below to include in the declaratory judgment a provision that Lumbermens' policy is available to satisfy any judgments which any of the plaintiffs may obtain against Cionci's estate and directing Lumbermens to pay the judgment which Lynch's estate had already obtained against Cionci's estate. Any other practical contingencies which imagination may suggest are of no legal consequence.[10] In this regard Dutcher and Cionci's estate

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[9] See Waterman v. Canal-Louisiana Bank, 215 U.S. 33, 49-50 (1909), where the court said: "If [the court] finds the issue in favor of the complainant, it may proceed to determine the proportion in which the complainant and [the present defendants] . . . are entitled to share, without prejudice to the rights of [the absent defendant]. It may direct the retention of his share in the hands of the executors, to be adjudicated in some other suit, or may otherwise shape its relief so as to do justice to the parties before the court without affecting his interest." See also Pennock v. Coe, 64 U.S. (23 How.) 117, 131 (1859), where one of the reasons the court refused to allow plaintiff to collect on his judgment was that other bondholders of the same priority were not parties to the suit. The court said that when a fund is insufficient to meet the claims of all creditors, there should be no distribution until all the claimants are present for a pro rata distribution.

[10] Illustrations are given by Hazard, cited supra, n. 1, at 1288-89, n. 183: "Of course, an absent party may be prejudiced by the stare decisis effect of a decision, but surely no one will urge that all persons must be joined in a suit the decision of which may sometime serve as an adverse precedent. An absent party may also be prejudiced by the parties' *acting in accordance* with a decree or judgment, as when a fund is distributed to creditors. But this prejudice does not result from the fact that the absentee is bound by the judgment, but because the practical value of a later suit by him may be impaired by the change of out-of-court circumstances. The prospect of such impairment is indeed a factor to be considered in determining who should be joined, *i.e.*, who are necessary parties. . . . But the sole fact of such impairment is not ground for refusing to proceed, any more than the fact that a debtor's payment of a judgment will impair his ability to pay others is ground for refusing to proceed with a creditor's suit." Hazard goes on to point out: "And in no event can such a practical impairment occur when . . . the judgment is simply declaratory, not requiring or involving change in out-of-court circumstances affecting the practical position of the absentee."

[fol. 343] are not unlike joint tortfeasors, each of whom would naturally prefer the joinder of the other in order that contribution might be assured. But one joint tortfeasor cannot escape suit because his fellow joint tortfeasor has not been named as a defendant in the same litigation. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 330 (1955).

Dutcher not only will suffer no harm by his absence from the present action; he can gain nothing by being joined. Indeed Dutcher would probably consider adverse to his interest a requirement that he join. For he refrained from intervening under Rule 24 and thus is not bound by the judgment adverse to Lumbermens, even though he would have benefited had the judgment been in its favor. *Makariw* v. *Rinard, supra.*

Nor does Dutcher's absence preclude our rendering a judgment consistent with equity as between the present parties. It is, of course, here that the full utility, though not the finality, of the plaintiffs' judgment is subject to the outcome of the suits against Dutcher. But in this respect it is of the utmost significance that the question of Dutcher's non-joinder was not raised by any of the parties[11] but was first initiated by us at the argument of the appeal, after the action had been tried by a court and jury and more than eight years have now gone by since the accident [fol. 344] occurred.[12] The question, therefore, is not whether the district court in the exercise of its undoubted discre-

[11] The 1966 amendment to Rule 12(h)(2) would indicate, as would the comments of the Advisory Committee on that section and on the amended Rule 19, that the objection of the failure to join a party comes too late after trial on the merits.

[12] The accident occurred on January 17, 1958. It is true that in Shields v. Barrow, supra, the suit was dismissed after 13 years of litigation. This is not, however, a direction that we should be indifferent to the lapse of time. The view of a more leisurely age is not a safe guide in a time of court congestion and the increased recognition of the rights of parties to the prompt determination of their claims, a right as old as Magna Carta.

tionary power[13] should have initially dismissed the action before allowing it to go to trial. There now exists a new element which has entered into the consideration of the exercise of equitable discretion since the case was first brought in the district court,—the jury's factual finding. This factual determination, fairly made, of the issue of Cionci's deviation in the use of Dutcher's car, must now be preserved if it is possible to do so. For if it should turn out that the total amount of the judgments against Cionci's estate and Dutcher does not exceed the limits of the policy, there will be no conflict between Dutcher and Cionci's estate over the coverage of the policy, and the controversy over Cionci's coverage by Lumbermens would, without more, be ended by the declaratory judgment. On the other hand, to require Dutcher's joinder now would, at the least, mean a retrial on the same evidence and with no change in circumstances except the nominal one that he would be a party on the record.[14] To ignore these factors is to eliminate what is the crucial element in the case as it is now before us.

Thus the present declaratory judgment would definitely determine Lumbermens' obligation to pay the judgments against Cionci if no conflict arises with Dutcher's rights; and if the contingency should come to pass in which Dutcher [fol. 345] has an interest which clashes with Cionci's, the declaratory judgment would not affect his rights, nor would it subject Lumbermens to double liability. There is present, therefore, the immediate and substantial prospect of au-

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[13] A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961); Brillhart v. Excess Insurance Co., 316 U.S. 491 (1942).

[14] If Dutcher were aligned as a party defendant with Lumbermens, diversity jurisdiction would be defeated. Of course, this would not excuse the absence of an indispensable party. But "the necessity for relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of this rule would oust them of their jurisdiction. . . ." Payne v. Hook, 74 U.S. (7 Wall.) 425, 435 (1868). See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 407-8 (1964).

thoritatively settling the controversy between Cionci's judgment creditors and Lumbermens without doing any legal or practical injury to the rights of Dutcher, the absent person. All this is possible as a result of the jury's factual determination that Cionci was driving the automobile with Dutcher's consent at the time of the accident. Preserving this factual finding and making it as fully applicable as it may be in Dutcher's absence as a party would permit us to utilize the declaratory judgment to a substantial extent instead of completely abandoning the result which the judicial process has already yielded.

It seems clear to me, therefore, that under the old Rule 19 the suit should not be dismissed because of Dutcher's absence as a formal party. This is made even more clear by the completely rewritten, new Rule 19. It provides that a person whose joinder will not deprive the court of jurisdiction over the subject matter of the action[15] shall be joined as a party if he claims an interest relative to the subject of the action and the disposition of the action in his absence may "as a practical matter impair or impede his ability to protect that interest. . . ." If such a person cannot be made a party, the court must determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The Rule lists the factors to be considered by the court, among which are the extent to which a judgment will be prejudicial to the absent person or to those who are parties, and "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided."

[fol. 346] The Advisory Committee has emphasized that it rewrote Rule 19 because a number of courts, misled by the unfortunate language of the old Rule, had failed to apply it pragmatically. Again and again, in various terms the Committee has declared that "the case should be examined

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[15] See supra, n. 14.

pragmatically and a choice made between the alternatives of proceeding with an action in the absence of particular interested persons, and dismissing the action." The Committee recognized that "an adjudication between the parties who are present before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person." These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they "do not themselves negate the court's power to adjudicate as between the parties who have been joined." The Committee attributed to confusion over the language of the old Rule the mistaken view taken by some courts "that the absence from the lawsuit of a person who was 'indispensable' or 'who ought to be [a] part[y]' itself deprived the court of the power to adjudicate as between the parties already joined." Some courts, the Committee said, were misled by the "jurisdictional fallacy" and made no inquiry how the case might proceed, while others were preoccupied with abstract classifications. The Committee therefore undertook to strengthen the Rule by affirmatively stating the factors which are relevant in deciding whether the action should proceed or be dismissed. These factors, the Committee has wisely noted, are not exclusive. In view of the history of the old Rule it would have been well to have included the substance of this comment in the text of the new Rule.

It is plain from the provisions of the Rule and the comments of its draftsmen that it is within the court's discretion and certainly within its power to permit a case to continue even though a so-called "indispensable" party is not joined. Indeed, the draftsmen explicitly adopt the [fol. 347] view that whether a party is indispensable is the statement of a conclusion rather than a guide to decision.[16]

[16] The Committee stated: "The subdivision uses the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon

Rule 19 in effect, therefore, is an effort to restate the liberal view which requires a practical consideration of the circumstances and an effort to shape relief to avoid injustice rather than the automatic dismissal of the action by applying the label of "jurisdictional" defect because an interested person was not made a party. The difference between the old and the new Rule 19 is graphically illustrated in the change in title. It formerly was entitled, "Necessary Joinder of Parties"; it is now entitled, "Joinder of Persons Needed for Just Adjudication". Thus, the Committee has endeavored to emphasize the importance of equitable, discretionary factors.

The new Rule 19 applies to this case, which was pending before us on July 1, 1966, when the amendments went into effect.[17] Indeed it is on this appeal that the question of Dutcher's "indispensability" first arose. Thus, even if the new Rule had altered the prior law, the action should not now be dismissed.

The majority, however, refuses to consider how the jury's verdict may be preserved and dismisses this as irrelevant because the defect is "jurisdictional". The label bottles up all such considerations of practicality and equity. This lack of "jurisdiction" the majority finds from standards for determining indispensability which it declares are "substantive," and so, under the Enabling Act (28 U.S.C. § 2072) cannot be affected by Rule 19. From this no conclusion can be drawn except a condemnation of the new Rule 19 as invalid. It is a consequence which I believe is unjustified and born of the mistaken, abstract conception of [fol. 348] an artificial distinction between "substantive" and "procedural", which would draw a narrow line to mark the

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consideration of the factors above-mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." See also supra, n. 4.

[17] See 383 U.S. —— (1966). See also John R. Alley & Co., Inc. v. Federal Nat. Bank of Shawnee, 124 F.2d 995 (10 Cir. 1942); Hoffman v. New Jersey Federation, 106 F.2d 204, 207 (3 Cir. 1939).

permissible scope of the federal rules, contrary to the teaching of *Hanna* v. *Plumer*, 380 U.S. 460 (1965).

I believe, therefore, that the circumstances require that the factual finding that Cionci was driving the automobile with the permission of Dutcher should be preserved despite Dutcher's absence as a party, that the law as it existed under the old Rule 19 permitted this, and that the new Rule 19 which is valid and applicable re-emphasizes the desirability of doing so.

II.

The Availability of Declaratory Judgment.

The second ground for dismissal of the action also was not urged by the defendant either in the court below or here on appeal. It may be conceded, whatever its merit, that the trial judge in the exercise of his undoubted discretion might have dismissed the action so that the evidence question would be decided by a state court. But that is not what is before us now. Seven years have gone by since the suit was brought. A jury's verdict has settled the factual dispute. The merits of the decision were reviewed on post-trial motions in the court below and were presented here on appeal. All this, the fruit of adversary litigation, is now cast away, and the justification for it is said to be the discretionary power not to entertain declaratory judgment suits where other, more appropriate relief is available. It seems to me that on the contrary our discretion should be exerted in order to save for the parties and for the judicial process what has already been validly determined, rather than to ignore all this and artificially deal with the case as if it had just been instituted in the court below. The Supreme Court recently has rejected automatic application of its latest decisions to past events. Instead it has weighed the practical effect of their retrospective operation.[18] We

[18] Miranda v. Arizona, —— U.S. —— (1966).

[fol. 349] should do no less in considering on review the exercise of discretion, and we should test it not by what we would have done if the matter had come to us in the district court before the trial, but rather as it is before us now.

I have already expressed the view that the ultimate judgment entered in the court below in this case is one which can be made effective and should not now be cast aside because there exists the speculative possibility that Dutcher may come to have an interest which would be effected although it is equally likely at least that this may never come to pass.

I therefore would not dismiss the declaratory judgment action. On the contrary, I would preserve the declaratory judgment decree by directing the court below to amend it by expressly staying any execution by virtue thereof until Dutcher shall have had a full opportunity, either in the court below or in the state courts to present any claims he may have to the protection of Lumbermens' policy as a result of the determination of the now pending state court actions against him.

Since I would not dismiss the action, it is necessary that I discuss the contentions made on the merits, which the majority does not reach.

III.

Dutcher's Competency as a Witness.

1. The Dead Man's Rule.

The question which the parties have presented is this: Did the Pennsylvania Dead Man's Rule[19] render Dutcher incompetent as a witness against the estates of Lynch and Smith on the ground that his interest was adverse to that of the decedents?

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[19] Act of May 23, 1887, P. L. 158, § 5(e), 28 Purdon's Pa. Stat. Annot. § 332.

The trial judge held that Dutcher was incompetent as a witness against the Lynch and Smith estates because the [fol. 350] purpose of their claims is to subject the policy to Cionci's liability, whereas Dutcher has an interest in maintaining it for himself. The court reasoned that since the policy has fixed limits and the aggregate amount of the judgments which may be recovered against Cionci's estate and Dutcher, respectively, is as yet unknown, it is possible that the Lynch and Smith estates' claims against Cionci's estate might reduce the protection available to Dutcher under the policy, and Dutcher therefore had an interest adverse to that of the Lynch and Smith estates which barred him from testifying against them.[20] Although, as I have pointed out, the judgment in this action can have no adverse legal effect on Dutcher, it could have operated in his favor because under Pennsylvania law the estates of Lynch and Smith would have been bound by a judgment adverse to them.[21] Dutcher therefore had an interest that may be characterized in a general sense as adverse to that of the estates in this action. The question is whether his interest was adverse within the meaning of the disqualifying statute.[22]

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[20] Cionci's estate made no objection to Dutcher's testimony.

[21] See n. 8, supra.

[22] Most writers have urged that the dead man's rule be abandoned as a relic of common law disqualification of all interested parties. See 2 Wigmore, Evidence (3d ed. 1940), §§ 575-80; McCormick on Evidence (1954), pp. 142-44; 1 Morgan, Basic Problems of Evidence (1954), pp. 84-5; American Law Institute, Model Code of Evidence (1942); pp. 92-7. For a dissent by an eminent Orphans' Court judge, based on long experience, see Gest, The "Dead Man Statute", Pa. Bar Q., March, 1930, p. 18.

This court, however, has held that the rule of a survivor's incompetency is so thoroughly established in Pennsylvania that despite strong criticism it may not be supplanted by federal decisional rules in a diversity action. Wright v. Wilson, 154 F.2d 616, 620 (1946), cert. denied, 329 U.S. 743 (1946). Cf. Hanna v. Plumer, 380 U.S. 460 (1965).

The seemingly simple language of the Act has been the subject of innumerable decisions and its application in particular circumstances is not always free from doubt. In the present case the effect of a judgment in this action on Dutcher at the time he testified must have appeared contingent at the most. For it is unknown even now whether he will ever be called upon to make any payments beyond the coverage of the insurance policy even if Cionci is also held to be covered by it. There are no Pennsylvania deci- [fol. 351] sions which would flatly decide whether in these circumstances Dutcher was competent to testify against the Lynch and Smith estates. We need not now decide, however, the correctness of the ruling of the court below. For Dutcher testified fully on the same factual issue as to the Harris claim, and now that the issue was decided against Lumbermens and in favor of Harris, Lumbermens may not raise it against the Lynch and Smith estates. As to Lumbermens, therefore, the exclusion of Dutcher's testimony on the claims of the Lynch and Smith estates, even if erroneous, would not justify reversal, because Lumbermens is estopped from raising the issue.

2. Collateral Estoppel.

Harris survived the tragedy and the Act of 1887 therefore is inapplicable to him. Dutcher testified fully on behalf of Lumbermens against him. The issue there was identical with that in the claims of the Lynch and Smith estates, which were tried at the same time before the same judge and jury, i.e., did Cionci deviate from the terms of the loan.

It is true that the Lynch and Smith estates were not strictly speaking parties in the Harris claim which the jury adjudicated, and that one who is not a party or in privity with a party to the first action, not being bound by that judgment, ordinarily is forbidden, on the principle of mutuality, from claiming the benefit of it. But the indiscriminate application of the requirement of mutuality was discredited in the pioneer California case of *Bernhard* v.

Bank of America National Trust and Savings Association, 19 Cal. 2d 807, 122 P.2d 892 (Cal. 1942).[23] In broad terms Justice Taylor there said: "The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litiga- [fol. 352] tion in which the matter was decided. . . . He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. . . . There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation." (122 P.2d, at 894).

The modern rule was applied in *Bruszewski* v. *United States*, 181 F.2d 419 (3 Cir. 1950), cert. denied, 340 U.S. 865 (1950); and it has been accepted in Pennsylvania.[24] In *Bruszewski* an injured longshoreman's suit against the United States for negligence of the crew and the unseaworthiness of the vessel was held barred by a prior directed verdict and judgment against the same plaintiff in favor of Isthmian Steamship Company, which serviced the vessel under an agreement with the United States, where the grounds for the claimed liability were the same. The basis of the decision was that the plaintiff could not litigate in a second suit, even against a different defendant, the issues which he had litigated and lost in the first suit. Judge Hastie, speaking for the court, said: "This second effort

[23] See Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 Atl. 260 (1934).

[24] Bruszewski was cited favorably by the Pennsylvania Supreme Court in Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 33 (1957), cert. denied, 355 U.S. 832 (1957). See also Posternack v. American Casualty Co. of Reading, 421 Pa. 21, 25-26 (1966); Davis v. McKinnon & Mooney, Inc., 266 F.2d 870 (6 Cir. 1959); Spector v. El Ranco, Inc., 263 F.2d 143 (9 Cir. 1959). Cf. Hurley v. Southern California Edison Co., 183 F.2d 125, 135-36 (9 Cir. 1950).

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to prove negligence is comprehended by the generally accepted precept that a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. . . .

"The countervailing consideration urged here is lack of mutuality of estoppel. . . . But a finding of negligence in the Isthmian case would not have been binding against the United States because the United States had no opportunity to contest the issue there. . . . Thus, no unfairness results here from estoppel which is not mutual. In reality the argument of appellant is merely that the application of *res judicata,* in this case makes the law asym- [fol. 353] metrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata.*" (181 F.2d, at 421). This principle was very recently recognized in *Makariw* v. *Rinard,* 336 F.2d 333 (3 Cir. 1964), which held res judicata inapplicable against a defendant where the plaintiff had earlier obtained a judgment against the defendant's employer. The court, applying Pennsylvania law, distinguished cases which enforced res judicata, on the ground that "in each, unlike the instant case, the party foreclosed had litigated the critical issue in a prior action." (336 F.2d, at 335).

A penetrating study of the subject (Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine,* 9 Stan. L. Rev. 281 (1957), has shown that injustice might result from an unlimited application of the doctrine of the *Bernhard* case.[25] It has therefore been suggested that the

[25] For example, a disaster such as a railroad or airplane accident may give rise to numerous suits against the same defendant. On accepted principle, any judgments for the defendant, no matter how numerous, will not bind absent plaintiffs. To give full scope to the language of the Bernhard case in such circumstances would offend against the most common notions of fairness. For no amount of victories by the defendant would conclude the remaining plaintiffs, whereas a single victory by any one of the plaintiffs anywhere along the line would collaterally estop the defendant as to its negligence in all the succeeding cases.

requirement of mutuality should not be discarded where the party sought to be estopped has not had a full and fair opportunity to litigate the issue effectively because of his former adversary's possession of the initiative.[26] This difficulty was recently considered and the suggested limitation adopted in *Zdanok* v. *Glidden Company, Durkee Famous Foods Division,* 327 F.2d 944 (2 Cir. 1964), cert. denied, 377 U.S. 934 (1964). Judge Friendly on a review of the circumstances found that the defense in the first suit was diligent and adequate and therefore applied collateral estoppel notwithstanding the absence of mutuality.[27] [fol. 354] It is clear, therefore, that the requirement of mutuality will not be eliminated where the result would be to impose any hardship or unfairness on the party who lost the first suit. In the present case the facts uniquely combine to remove any possible element of unfairness if mutuality is not required. The object of the present proceeding was to overthrow judicially Lumbermens' disclaimer of coverage of Cionci's estate. The primary adversaries therefore were Cionci's estate and Lumbermens, and it was through Cionci's estate, which was a named party, that the plaintiffs, including Harris, claimed. The jury decided on the merits in Harris' claim that Lumbermens' policy covered Cionci's estate. Lumbermens there had full opportunity, of which it availed itself, to present Dutcher's testimony regarding his loan of the car to Cionci. Lumbermens therefore is bound by that determination and may not raise it against the Lynch and Smith estates.

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[26] Currie, supra, at p. 308. For the railroad or airplane accident cases Currie suggests that mutuality should be required because of the injustice to the defendant faced with many successive suits.

[27] To the same effect is Graves v. Associated Transport, Inc., 344 F.2d 894 (4 Cir. 1965). See also United States v. United Airlines, Inc., 216 F.Supp. 709, 725-29 (D.Nev. 1962), affirmed on this point, 335 F.2d 379, 404-5 (9 Cir. 1964), cert. dismissed, 379 U.S. 951 (1964).

IV.

The Claim of Prejudice by Joinder.

Lumbermens seeks a new trial as to Harris on the ground that it was prejudiced before the jury by the directed verdict in favor of the Lynch and Smith estates. There is no merit in this contention under the circumstances. Lumbermens itself brought about the joinder of Harris and the Smith estate as plaintiffs, and later opposed the efforts of the Lynch estate to obtain a severance of the trial of its cause of action from that of Harris and the Smith estate. Lumbermens opposed the severance on the ground that it would defeat the very purpose for which it had successfully sought the joinder of Harris and the Smith estate. This purpose was to have Cionci's coverage determined in one trial with respect to all the interested plaintiffs and thereby avoid a multiplicity of trials. Having brought Harris and the Smith estate into the proceedings as plaintiffs and resisted the efforts of the Lynch estate to obtain a severance, it is too late for Lumbermens [fol. 355] to urge now, after the verdict has gone against it, that it suffered an injustice which requires a new trial because of its own success in having the three claims tried together.[28]

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[28] Compare Bruszewski v. United States, 181 F.2d 419, 421, n. 2 (3 Cir. 1950), cert. denied, 340 U.S. 865 (1950), where it was noted that Bruszewski had sustained a single injury from a single cause and therefore might have consolidated his claims against the two defendants in one suit rather than have brought separate suits as he did. Judge Hastie said: "While the claimant was not obliged thus to consolidate his suits, no canon of fairness requires that he be given the special advantage of twice trying the same issue where he did not elect to join them."

V.

The Instructions on Deviation.

There is no merit in the contention made in the appellant's brief, but not pressed at the argument or reargument, that there was reversible error in the charge to the jury dealing with the question whether Cionci deviated from the permission granted him by Dutcher.

There were two factual problems presented. One related to the distance and the other to the time which limited the permission granted by Dutcher. Dutcher was the only witness on these matters, since Cionci, and Lynch who accompanied him, were both dead, and Harris, who survived, had not been present when the permission was granted.

Lumbermens presented a point for charge on the distance limitation, which the trial judge did not adopt, because it was covered by the charge.[29] He then dealt with the limitation as to time. He stated his recollection that Dutcher had indicated that they were to return in a half hour, but that other questioning of Dutcher indicated that perhaps a couple of hours might have been involved. He expressly left it to the jury to recall what the evidence on this was and to interpret it in order to determine what permission Dutcher gave to Cionci and whether that per-
[fol. 356] mission was exceeded.[30] He then stated emphati-

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[29] "If Mr. Dutcher gave permission only to go to Ardmore and return, and Cionci drove to Media, I think that we all agree that when you look at the map, that goes beyond what you would call a minor deviation from the permission, because of the distance that is involved."

[30] "There is also a possibility that Mr. Dutcher's permission was limited in space, destination and return being Ardmore, as he testified at one point, or possibly it was limited as to time. As I recall, he indicated he provided that they would be back in a half hour. Then there was some other questioning of him which seemed to indicate that perhaps a couple of hours might have

cally that if Dutcher had given a limited permission and it was exceeded, the jury must find for the defendant.[31]

The charge authorized the jury to find in favor of Lumbermens if there was any use of the car beyond the permission granted and made no allowance for minor deviation. The charge therefore was more favorable to Lumbermens than the evidence justified.

It is clear therefore that the charge was free from error prejudicial to Lumbermens, and that even if there were error it would not justify reversal.

In my view therefore the verdict of the jury should be permitted to stand. Since the court dismisses the action, I dissent.

I am authorized to state that Judge Ganey joins in this dissent.

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been involved. But this is all for you to recall precisely what the testimony was.

"The thing you must consider is whether Mr. Dutcher's testimony is credible and, if you determine that it is credible, you will have to interpret precisely what permission he gave to Ciofici to drive this car and whether that permission was exceeded."

[31] "If the permission was exceeded, then you must find in favor of the defendant. . . . If you get to the point where you believe that he [Dutcher] gave a limited permission and that the limited permission was exceeded, then you must return a verdict in favor of the defendant."

[fol. 357]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,589

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Administrator of the ESTATE OF JOHN R. LYNCH, also known as JOHN ROBERTS LYNCH, Deceased (Plaintiff),

and

JOHN LANDIS HARRIS and SARAH B. SMITH, Administratrix of the ESTATE OF THOMAS W. SMITH, Deceased (Party Plaintiffs),

vs.

LUMBERMENS MUTUAL CASUALTY COMPANY and GEORGE M. PATTERSON, Administrator of the ESTATE OF DONALD CIONCI, Deceased,

LUMBERMENS MUTUAL CASUALTY COMPANY (Defendant), Appellant.

(D. C. Civil Action No. 26455)

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Present: Staley, Chief Judge, and McLaughlin, Kalodner, Hastie, Ganey, Smith and Freedman, Circuit Judges.

JUDGMENT—August 30, 1966

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court of July 8, 1963 be, and the same is hereby vacated with costs and the cause remanded with directions to dismiss the declaratory judgment action.

August 30, 1966.

[File endorsement omitted]

[fol. 358] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 359]

SUPREME COURT OF THE UNITED STATES

No. 806, October Term, 1966

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Administrator of the ESTATE OF JOHN R. LYNCH, etc., Petitioner,

v.

GEORGE M. PATTERSON, Administrator of the ESTATE OF DONALD CIONCI, et al.

ORDER ALLOWING CERTIORARI—February 27, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.
OF THE

Supreme Court of the United States

October Term, 1969

No. 806 28

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMR. of the Estate of JOHN R. LYNCH, A/K/A JOHN ROBERT LYNCH, Deceased,

Petitioner,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, Admx. of the Estate of THOMAS W. SMITH, Deceased

v.

LUMBERMENS MUTUAL CASUALTY COMPANY

and

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Fink: Indispensable Parties and the Proposed Amendment to the Federal Rule 19, 74 Yale Law Journal 403 (1965)	7
39 F. R. D. 91, et seq.	8, 9
Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254 (1961)	7, 8
6 Moore's Federal Practice, 3003	14
6 Moore's Federal Practice, 3007	13
Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957)	7, 8, 13
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No.

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMR. OF THE ESTATE OF JOHN R. LYNCH, A/K/A JOHN ROBERT LYNCH, DECEASED,
Petitioner,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, ADMX. OF THE ESTATE OF THOMAS W. SMITH, DECEASED,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY

and

GEORGE W. PATTERSON, ADMR. OF THE ESTATE OF DONALD CIONCI, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Provident Tradesmens Bank and Trust Company, Administrator of the Estate of John R. Lynch, A/K/A, John Robert Lynch, Deceased, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on August 30, 1966.

OPINIONS BELOW.

The Opinion of the Trial Court, printed in the Joint Appendix (p. 243a) for use of the Court below, nine copies of which are filed herewith, is reported at 218 F. Supp. 802 (E. D. Pa., 1963). The opinion of the United States Court of Appeals for the Third Circuit, printed as Appendix A, hereto, is reported at — F. 2nd —. The Order of said Court of Appeals is printed as Appendix B hereto.

JURISDICTION.

The Decree of the United States Court of Appeals for the Third Circuit was entered on August 30, 1966 (Appendix B). The jurisdiction of this Court is involved under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. When an automobile owned by the named insured in an automobile liability insurance policy is lent to operator who is killed in a car collision causing additional deaths and a serious injury and the insurance carrier refused coverage to operator's estate in multiple suits both in State and Federal Courts under permissive use clause; was not a declaratory judgment action against the insurance carrier, in which all injured and dead through their personal representatives were joined without objection, within the sound discretion of the Trial Judge?

2. Under the above circumstances, where the named insured is one of the defendants in the State Court actions, but his interest was contingent and remote, and he could not be joined as a defendant in the instant case because of lack of diversity of citizenship, and the judgment of the court does not affect his interest or bind him, was not the Trial Court justified in proceeding without the named insured as a party under former Rule 19 of Federal Rules of Civil Procedure and the recently amended Rule 19, and to the extent Rule 19 requires a pragmatic application of the indispensable party concept, is it not a valid exercise of the rulemaking power of this Court?

STATEMENT OF THE CASE.

This was a civil action calling for a declaratory judgment and was commenced by the Provident Tradesmens Bank and Trust Co., Administrator of the Estate of John R. Lynch, Deceased, for the purpose of determining whether or not Donald C. Cionci, Deceased, the admitted tortfeasor, was an assured under a policy of insurance issued by the defendant, Lumbermens Mutual Casualty Co., to one Edward S. Dutcher. All page references are to Appendix A, the record in that Trial Court.

The cause of action arose out of an accident which occurred on January 17, 1958, involving an automobile owned by Edward S. Dutcher, which at that time and place was being driven by Donald C. Cionci, and in which John R. Lynch was a passenger in the front seat. John Landis Harris, an additional plaintiff in the action, was a passenger in the rear seat.

The automobile being operated by Cionci struck an automobile being driven by Thomas W. Smith. As a result of the accident, John R. Lynch, Thomas W. Smith and Donald C. Cionci were killed or died of the injuries received, and John Landis Harris was injured. Prior to the instant action, the Provident Tradesmens, as Administrator of the Lynch Estate, brought an action against the Cionci Estate in the United States District Court for the Eastern District of Pennsylvania and entitled as Civil Action No. 25149 (276a). A default judgment was subsequently entered after a copy of the Complaint had been forwarded to Lumbermens Mutual Casualty Co.; and upon their refusal to defend, a default judgment was subsequently entered and the matter was listed for assessment of damages.

When the case was called for trial, the administrators of the Cionci estate, after notice to Lumbermens Mutual Casualty Co., settled the claim of Provident Tradesmens

for $50,000 and forwarded a judgment note in that amount to Provident Tradesmens, as Administrators of the Estate of Lynch (277a). This settlement, after notice to Lumbermens Mutual Casualty Co. and their attendance therein, was approved by this court, Van Dusen, J., on November 20, 1962 (280a). On November 29, 1960, upon motions of Lumbermens Mutual Casualty Co., the Court entered an order joining John Landis Harris and Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased, as party plaintiffs (17a). Sarah B. Smith, hereinafter called Smith, had brought suit in the Court of Common Pleas in Delaware County, No. 1047, December Term, 1959, against Edward S. Dutcher, the Estate of John R. Lynch and the Estate of Donald C. Cionci. John Landis Harris had also brought suit in the Court of Common Pleas in Delaware County, No. 1048, December Term, 1959, against the same three defendants (39a).

The matter was ultimately tried before the Honorable Alfred L. Luongo on December 13, 1962. During the trial, the court held extended arguments as to the competency of Dutcher, the only surviving witness to the transaction at which the keys of the car were given to Cionci. The court ruled that Dutcher was incompetent to testify under the Dead Man's statute as to the Estate of Lynch and the Estate of Smith, but competent to testify as to Harris. Thereafter, counsel for Lynch did not participate in the examination of Dutcher. At the conclusion of the evidence, a verdict was directed by the court in favor of the Estates of Lynch and Smith and the case was given to the jury as to Harris.

The jury then found a verdict in favor of Harris which, in the light of the charge, was a finding that Cionci was driving Dutcher's vehicle within the orbit of consent given to Cionci by Dutcher. Motions were timely filed by Lumbermens for Judgment N. O. V. and for a new trial after argument before Judge Luongo. Motions for Judgment N. O. V. and for a new trial were then denied.

The Court molded the verdict of the jury into a fact-finding judgment fixing the rights of the parties within the orbit of the controversy. It refused a form of judgment that would have required immediate execution. Appeal was taken from such refusal, but this appeal was ultimately abandoned (257a, 258a).

The matter was first argued before a panel of the Court of Appeals on October 6, 1964. After wrestling with the matter for some eighteen months, it was ordered for reargument on June 9, 1966. The majority of the court found that Dutcher was an indispenable party and, therefore, the trial court was without jurisdiction. It also found that the trial court abused its discretion in entertaining the declaratory judgment action. It found further that the amended rule 19 in the light of the advisory committee's note exceeded the rule-making power of this court. It found that the concept of indispensable party was substantive in nature and insulated from the reach of the rule-making power of this court.

The minority of the court in a vigorous dissent believed that the action should not have been dismissed under former Rule 19 or amended Rule 19 and that the entertainment of the declaratory judgment was within the sound discretion of the court. It strongly defended amended Rule 19 both as to its application and validity.

REASONS FOR GRANTING THE WRIT.

I. The Majority Opinion Preserves the Rigidity and the Spurious Jurisdictional Application of the Indispensable Party Rule, Whereas the Concept of Indispensable Party Is Procedural in Nature and Within the Rule-Making Power of Amended Rule 19 of Federal Rules of Civil Procedure.

Rule 19 of the Federal Rules of Civil Procedure was transmitted to Congress on February 28, 1966 pursuant to 28 U. S. C. 2072. The effective date of the amendment was July 1, 1966. It is undisputed that Federal Rules of Civil Procedure are retroactive in effect and are applicable to the instant cause. The importance of the change in Rule 19 must be weighed against the context of the facts in the instant case.

Dutcher, the named insured, is a defendant in two state court actions brought by John Landis Harris and Sarah B. Smith, respectively. These actions have lain dormant awaiting the outcome of the declaratory judgment action in the instant case. The actions in the state court were shotgun in nature inasmuch as they sued both the estate of Cionci and the estate of Lynch in addition to Dutcher. While the state court complaints have never been part of the record of the instant case, it is obvious from the facts that Dutcher was not present in the automobile and the undisputed testimony is that he lent his car to Cionci and Lynch and the only issue being whether they exceeded the orbit of his permission. The only possible cause of action against Dutcher would be on the vague possibility that an agency relationship may have existed.

At the trial upon the declaratory judgment action, Dutcher testified that he loaned the car to Cionci and Lynch in a tavern in Bryn Mawr, Pennsylvania, so that they could go to Ardmore to pay a bill (191a). Ardmore is about a five-minute ride from Bryn Mawr (192a). Harris, the only

surviving participant in the collision was a passenger in the Lynch and Cionci car. He had entered the automobile in Media, Pennsylvania, when he accepted the invitation to ride back to Bryn Mawr (184a). Media, Pennsylvania, is in the opposite direction than Ardmore, Pennsylvania, and considerably further away (225a). Counsel representing the plaintiffs in the state court actions was an active participant in the trial in the instant case. No evidence was introduced which would support an allegation of agency. Thus, it can be seen that the interest of Dutcher in the finite limits of his insurance policy was at best remote and contingent.

The purpose for the change in Rule 19 grew out of the pathmaking of Professor Reed.[1] This was taken up by Professor Hazard when he brilliantly traced the origins of the concept of "indispensable party."[2] The majority opinion leans heavily on an article by a research associate at Yale Law School, which article was published as an answer to the proposed amendment and the advisory committee's comments.[3]

It is significant that the adoption of Rule 19 in the face of this article indicates the rejection by this court of the proposition advanced therein that the concept of indispensable party is one of substantive law and beyond the rulemaking power of this court. Yet, the majority opinion leans heavily upon this article to support its novel finding that the concept of indispensable party is one of substantive law. The majority opinion admits that its finding in this case is without precedent.

While the majority opinion makes reference to dictum in *Stevens v. Loomis,* 334 F. 2d 775, 778, note 7 (C. A. 1, 1964), an examination of that footnote indicates that Chief

1. Reed, *Compulsory Joinder of Parties in Civil Actions,* 55 Mich. L. Rev. 327, 356 ff., 483 (1957).

2. Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom,* 61 Colum. L. Rev. 1254 (1961).

3. Fink: *Indispensable Parties and the Proposed Amendment to the Federal Rule 19,* 74 Yale Law Journal 403 (1965).

Judge Aldrich has misread the purpose of rewriting Rule 19. The text writers, both Reed and Hazard, repeatedly stressed the procedural nature of this concept and so that there will be no question that Rule 19 does apply to the concept of indispensable party, the word "indispensable" was restored to Rule 19. As the comment to the rule makes clear, the purpose of the rule is to lay to rest "the jurisdictional fallacy and abstract classifications of rights or obligations." *39 F. R. D. 91.* The comment goes on to clearly indicate that there must be substituted a pragmatic approach before dismissal and indicates the factors that should be taken into consideration. *39 F. R. D. 92.*

> "The *first factor* brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat?"
>
> * * *
>
> "The *second factor* calls attention to the measures by which prejudice may be averted or lessened. The 'shaping of relief' is a familiar expedient to this end."
>
> * * *
>
> "Sometimes the party is himself able to take measures to avoid prejudice. Thus a defendant faced with a prospect of a second suit by an absentee may be in a position to bring the latter into the action by defensive interpleader."
>
> * * *
>
> "The *third factor*—whether an "adequate" judgment can be rendered in the absence of a given person—calls attention to the extent of the relief that can be ac-

corded among the parties joined. It meshes with the other factors, especially the 'shaping of relief' mentioned under the second factor.''

* * *

''The subdivision uses the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors above-mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.'' 39 F. R. D. 92, 93.

In the light of these considerations the minority opinion clearly indicates the impelling reasons why this case should not have been dismissed.

''Dutcher not only will suffer no harm by his absence from the present action; he can gain nothing by being joined. Indeed Dutcher would probably consider adverse to his interest a requirement that he join. For he refrained from intervening under Rule 24 and thus is not bound by the judgment adverse to Lumbermens, even though he would have benefited had the judgment been in its favor. *Makariw v. Rinard, supra.*

Nor does Dutcher's absence preclude our rendering a judgment consistent with equity as between the present parties. It is, of course, here that the full utility, though not the finality, of the plaintiffs' judgment is subject to the outcome of the suits against Dutcher. But in this respect it is of the utmost significance that the question of Dutcher's non-joinder was not raised by any of the parties but was first initiated by us at the argument of the appeal, after the action had been tried by a court and jury and more than eight years have now gone by since the accident occurred. The question, therefore, is not whether the district court in the exercise of its undoubted discretionary power

should have initially dismissed the action before allowing it to go to trial. There now exists a new element which has entered into the consideration of the exercise of equitable discretion since the case was first brought in the district court,—the jury's factual finding. This factual determination, fairly made, of the issue of Cionci's deviation in the use of Dutcher's car, must now be preserved if it is possible to do so. For if it should turn out that the total amount of the judgments against Cionci's estate and Dutcher does not exceed the limits of the policy, there will be no conflict between Dutcher and Cionci's estate over the coverage of the policy, and the controversy over Cionci's coverage by Lumbermens would, without more, be ended by the declaratory judgment. On the other hand, to require Dutcher's joinder now would, at the least, mean a retrial on the same evidence and with no change in circumstances except the nominal one that he would be a party on the record. To ignore these factors is to eliminate what is the crucial element in the case as it is now before us.

Thus the present declaratory judgment would definitively determine Lumbermens' obligation to pay the judgments against Cionci if no conflict arises with Dutcher's rights; and if the contingency should come to pass in which Dutcher has an interest which clashes with Cionci's, the declaratory judgment would not affect his rights, nor would it subject Lumbermens to double liability. There is present, therefore, the immediate and substantial prospect of authoritatively settling the controversy between Cionci's judgment creditors and Lumbermens without doing any legal or practical injury to the rights of Dutcher, the absent person. All this is possible as a result of the jury's factual determination that Cionci was driving the automobile with Dutcher's consent at the time of the accident. Preserving this factual finding and making it as

fully applicable as it may be in Dutcher's absence as a party would permit us to utilize the declaratory judgment to a substantial extent instead of completely abandoning the result which the judicial process has already yielded.

It seems clear to me, therefore, that under the old Rule 19 the suit should not be dismissed because of Dutcher's absence as a formal party. This is made even more clear by the completely rewritten, new Rule 19." (footnotes omitted, pages 33-35 of Appendix "A")

* * *

"It is plain from the provisions of the Rule and the comments of its draftsmen that it is within the court's discretion and certainly within its power to permit a case to continue even though a so-called 'indispensable' party is not joined. Indeed, the draftsmen explicitly adopt the view that whether a party is indispensable is the statement of a conclusion rather than a guide to decision.

Rule 19 in effect, therefore, is an effort to restate the liberal view which requires a practical consideration of the circumstances and an effort to shape relief to avoid injustice rather than the automatic dismissal of the action by applying the label of 'jurisdictional' defect because an interested person was not made a party. The difference between the old and the new Rule 19 is graphically illustrated in the change in title. It formerly was entitled, 'Necessary Joinder of Parties'; it is now entitled, 'Joinder of Persons Needed for Just Adjudication'. Thus, the Committee has endeavored to emphasize the importance of equitable, discretionary factors.

The new Rule 19 applies to this case, which was pending before us on July 1, 1966, when the amendments went into effect. Indeed it is on this appeal

that the question of Dutcher's 'indispensability' first arose. Thus, even if the new Rule had altered the prior law, the action should not now be dismissed.

The majority, however, refuses to consider how the jury's verdict may be preserved and dismisses this as irrelevant because the defect is 'jurisdictional'. The label bottles up all such considerations of practicality and equity. This lack of 'jurisdiction' the majority finds from standards for determining indispensability which it declares are 'substantive,' and so, under the Enabling Act (28 U. S. C. § 2072) cannot be affected by Rule 19. From this no conclusion can be drawn except a condemnation of the new Rule 19 as invalid. It is a consequence which I believe is unjustified and born of the mistaken, abtract conception of an artificial distinction between 'substantive' and 'procedural', which would draw a narrow line to mark the permissible scope of the federal rules, contrary to the teaching of *Hanna v. Plumer,* 380 U. S. 460 (1965)." (Footnotes omitted, pages 36-38 of Appendix "A".)

In addition to the cogent reasons pointed out by the minority opinion, Dutcher further benefits by the factual finding of the instant case, even as to the actions pending in the state court. If this judgment is permitted to stand, then the insurance carrier legally and in its own self-interest will defend the Cionci Estate, thus avoiding a default judgment as occurred in the suit between Provident Tradesmens Bank & Trust Company and the Estate of Cionci (280a-283a). It would provide an opportunity to resist not only liability but the orbit of damages, which could not help but be beneficial to Dutcher.

It is also significant that the judgment in the trial court in the declaratory judgment action was restricted to the factual finding necessary for the orderly resolution of the controversy. This is pointed up by the refusal of

the court below to render a money judgment but restricting the judgment to the insurance coverage and the fact of permission (257a). Thus, the trial court effectively molded the judgment with an unusual prescience as ultimately suggested by the language of the minority opinion. In this light, it is unfortunate that the majority opinion saw fit to require "a blind adherence to an elderly formula."[4]

II. The Declaratory Judgment Action Brought by the Estate of a Deceased Passenger to Determine Whether the Insolvent Estate of the Deceased Operator Is Insured Within the Terms of an Automobile Liability Policy, Absent Objection From the Other Plaintiffs or the Insurer, Is Within the Sound Discretion of the Trial Court.

The remedy of declaratory judgment in the Federal Court System is statutory.[5] It differs sharply from the Uniform Declaratory Judgment Act in that it does not contain the language of that act which relates to parties:

> "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . ."[6]

In addition, the Federal Act is explicit that an action for declaratory judgment will lie, notwithstanding the applicability of other remedies. This was reiterated in F. R. C. P. No. 57. The original committee note recognizes this important distinction:

> "The fact that a declaratory judgment may be granted 'whether or not further relief is or could be prayed' indicates that declaratory relief is alternative

4. Reed: *Compulsory Joinder of Parties in Civil Actions, supra,* at page 330.

5. 28 U. S. C. A., 2201-2202.

6. 6 Moore's Federal Practice, 3007.

or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will 'terminate the controversy' giving rise to the proceeding. . . ."

"When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. . . ."[7]

The policy in the instant case was an insurance policy containing a number of severable clauses. These clauses are effective or non-effective dependent upon given factual situations. These factual situations when in confiict or in controversy may be resolved by a declaratory judgment action.

The instant case differs only in that the declaratory judgment action was brought by the injured party to determine whether or not the tortfeasor was an assured within the meaning of the omnibus clause of the liability policy. Certainly if the insurer can utilize this remedy where there is a justiciable controversy, it is only fair and proper that the same opportunity be made available to an injured party. The injured party as plaintiff brought this action against the insurer. The insurer forced an amendment to the action to include all other injured parties, so that the determination of fact would be binding upon all necessary parties (R. 17a). Whatever the discretion of the court may have been at the earlier posture of the case, certainly within this posture the court was certainly within its sound discretion to entertain the suit inasmuch as all the parties would be affected directly by the decision before the Court and the single litigation would resolve this issue in all the other suits and avoid the multiplicity of litigation. It also had the desirable benefit of giving the defendant insurer an opportunity to resolve its status and that of the Estate of

7. 6 Moore's Federal Practice, 3003.

Cioncr so that it could act appropriately. The prospect of inconsistent results in the multiple suits was avoided.

Professor Borchard in his monumental volume, Declaratory Judgments (2d Ed. 1941), at p. 299, set forth the principal criteria for exercising this discretion:

> "The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding."

It is not necessary that the entire litigation be settled by the declaratory judgment proceeding, but it will suffice if an important issue is resolved as Professor Borchard points out at p. 298:

> "In connection with the maxim that the discretion will be favorably exercised when the judgment will 'terminate the controversy giving rise to the proceedings,' the question has arisen whether the whole controversy, of which the submitted issue is a part, must be settled, or whether only the narrow point in issue need be conclusively adjudicated. The answer is that only the narrow point in issue must be decided, although the presumption is that this point will settle some autonomous and independent issue of inherent importance, even should it not dispose of the entire litigation. For example, the petition of an insurance company that is by the facts exempted under the policy from the obligation to defend the insured or pay a judgment found against him does not go to the root of the whole litigation, especially the personal injury suit, but it does decide the exoneration or duty to defend of one important party and thus presents a segregable independent autonomous issue which may be litigated to judgment."

Even assuming, arguendo, that Dutcher was a necessary party, this defect, if any, was obviated, when Dutcher was not only present but had an opportunity to be heard on the important question as to the scope of permission. This, Borchard indicates, is a proper alternative to the joining of a necessary party in interest and his being bound thereby.

At page 299, Borchard, in discussing when discretion is proper to hear a declaratory judgment action relating to an insurance contract, stated:

> "The discretion to refuse to exercise federal declaratory jurisdiction is properly applied when a state action is already pending which can easily adjudicate the entire issue between and among all the parties in interest; when it is sought to foreclose the rights of absent injured parties by an uncontested suit by insurer against the insured, in which the insured connives with the insurer or supplies the evidence to enable him to establish 'no coverage' or to decide crucial issues of fact by default; where the declaratory procedure is used for procedural fencing to enable the company to defeat a natural state jurisdiction."

None of these criteria are present in the instant case. On the contrary, this action eliminates this factor from multiple suits. There was no connivance or collusion in the instant case. On the contrary, the insurer resisted the plaintiffs strenuously. There was a full rapport between the insurer and Dutcher and Dutcher was willing and available in support of the insurer and did in fact testify for the insurer when permitted.

The majority opinion mistakenly supposes that the precise issue of the declaratory judgment action will be or can be decided in the State Court actions. This is incorrect. First, the Administrator of the Estate of Lynch in the instant action is not the administrator of the estate of Lynch

in the State cases [8] (39a of Joint Appendix). Lumbermens Mutual Casualty Company is not a party to those actions, nor can they be under State Law. The issues in the instant case will not and cannot be resolved in the State actions. Another suit would have to be brought in the nature of a garnishment after the state court actions had been reduced to damages.

The cases cited by the majority opinion frown upon the practice of some insurance companies attempting to avoid State Court determination of their contractural liabilities by rushing into the Federal Court in a declaratory judgment proceeding. This was not the situation in the instant case. The declaratory judgment proceeding was initiated by Provident Tradesmens Bank & Trust Company, as administrator of the Estate of Lynch for a very pragmatic reason. Cionci was the operator of the offending automobile. The estate of Cionci is insolvent. It would be a futile thing to proceed, absent insurance coverage of Cionci under the permissive use clause of the policy purchased by the owner of the car. The same compelling reasons equally applied to the other plaintiffs who had brought their actions in the State Court. They, therefore, did not protest when they were joined in a declaratory judgment action at the insistence of the insurer. The insurer did not object because he could now, in a single action, have the issue of coverage determined, whereas the plaintiffs' actions were divided between the Federal and State Courts. The insurer avoids the dilemma of refusing to defend the Estate of Cionci and suffering a default judgment and an unopposed determination of damages or defending the actions and having a finding of waiver of its defenses under the policy.

The virtue of preserving the declaratory judgment action is well stated in the minority opinion:

---

8. The Estate of Lynch is a defendant in the State Court actions and in accordance with State procedure the plaintiffs had an administrator appointed for the Estate of Lynch as a defendant.

"The second ground for dismissal of the action also was not urged by the defendant either in the court below or here on appeal. It may be conceded, whatever its merit, that the trial judge in the exercise of his undoubted discretion might have dismissed the action so that the evidence question would be decided by a state court. But that is not what is before us now. Seven years have gone by since the suit was brought. A jury's verdict has settled the factual dispute. The merits of the decision were reviewed on post-trial motions in the court below and were presented here on appeal. All this, the fruit of adversary litigation, is now cast away, and the justification for it is said to be the discretionary power not to entertain declaratory judgment suits where other, more appropriate relief is available. It seems to me that on the contrary our discretion should be exerted in order to save for the parties and for the judicial process what has already been validly determined, rather than to ignore all this and artificially deal with the case as if it had just been instituted in the court below. The Supreme Court recently has rejected automatic application of its latest decisions to past events. Instead it has weighed the practical effect of their retrospective operation. We should do no less in considering on review the exercise of discretion, and we should test it not by what we would have done if the matter had come to us in the district court before the trial, but rather as it is before us now.

I have already expressed the view that the ultimate judgment entered in the court below in this case is one which can be made effective and should not now be cast aside because there exists the speculative possibility that Dutcher may come to have an interest which would be effected although it is equally likely at least that this may never come to pass.

I therefore would not dismiss the declaratory judgment action. On the contrary, I would preserve the declaratory judgment decree by directing the court below to amend it by expressly staying any execution by virtue thereof until Dutcher shall have had a full opportunity, either in the court below or in the state courts to present any claims he may have to the protection of Lumbermens' policy as a result of the determination of the now pending state court actions against him." (footnotes omitted, pages 38 and 39 of Appendix "A")

CONCLUSION.

The murky doctrine of indispensable party should not have been resurrected by the majority opinion in the Court of Appeals, especially in the light of the recent amendment to Federal Rule of Civil Procedure 19. It is erroneous for the majority to place the mantle of substantive law on this concept so as to insulate it from the pragmatic determination required by Rule 19, which in itself marked the culmination of a determined effort by legal scholars to correct an inequity in the law. The decision of the majority if permitted to stand places a cloud of invalidity on the salutory amendment to Rule 19.

The majority opinion would sharply curtail and emasculate the discretion of the trial courts to entertain declaratory judgment actions, whereas in the instant case none of the possible parties objected to the proceedings, and where a determination that there was no coverage would have effectively terminated all litigation as futile.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
AVRAM G. ADLER,
FREEDMAN, BOROWSKY AND LORRY,

J. WILLISON SMITH,
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Counsel for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14589

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF JOHN R. LYNCH, ALSO KNOWN AS JOHN ROBERTS LYNCH, DECEASED, (PLAINTIFF)

AND

JOHN LANDIS HARRIS AND SARAH B. SMITH, ADMINISTRATRIX OF THE ESTATE OF THOMAS W. SMITH, DECEASED (PARTY PLAINTIFFS)

v.

LUMBERMENS MUTUAL CASUALTY COMPANY AND GEORGE M. PATTERSON, ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, DECEASED

LUMBERMENS MUTUAL CASUALTY COMPANY
(DEFENDANT)
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 6, 1964

Before KALODNER, GANEY and FREEDMAN, *Circuit Judges*

Re-argued June 9, 1966

Before STALEY, *Chief Judge* and MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed August 30, 1966)

By KALODNER, *Circuit Judge*

The instant declaratory judgment proceeding[1] was brought by Lynch's Estate[2] to determine whether the coverage of a public liability policy issued by the defendant, Lumbermens Mutual Casualty Company, to an owner of an automobile, one Edward S. Dutcher, extended to the deceased Donald Cionci, who was driving the car at the time it was involved in an accident. The policy by its terms extended its coverage to any person operating Dutcher's automobile with his permission at the time of the accident. The critical fact issue to be determined in the declaratory judgment action was whether the automobile was being operated by Cionci within the scope of the permission granted to him by Dutcher when it collided with a truck driven by one Thomas W. Smith. Smith, Cionci and John R. Lynch, who was riding with Cionci, were killed; John Landis Harris, who was also a passenger in the Cionci car, was injured.

Lynch's estate sued Cionci's estate in the District Court for the Eastern District of Pennsylvania in Civil Action No. 25149, seeking damages under the Pennsylvania Wrongful Death and Survival Statutes.[3] The defendant insurance company refused to defend Cionci's estate on the ground that Cionci had deviated beyond the use authorized by Dutcher, viz., to drive from Bryn Mawr to Ardmore, some two miles southeast, provided he return in half an hour, whereas Cionci had instead driven some twelve miles in an opposite direction to Media. Lynch's estate obtained a default judgment against the Cionci

1 The action is premised on Section 2201 of the Declaratory Judgment Act, 28 U.S.C.A. which provides in relevant part as follows:

"In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, *may declare the rights and other legal relations* of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a *final judgment or decree* and shall be reviewable as such." (emphasis supplied)

2 For simplicity, the name of the representative of the Lynch Estate, namely, Provident Tradesmens Bank and Trust Company, is omitted.

3 See 12 P.S. §§ 1601, 1602, Wrongful Death Act, and 20 P.S. § 320.601, Survival Act.

estate and then brought this declaratory judgment action against the insurance company. Damages allowed on the judgment were subsequently fixed at $50,000.

Smith's estate, which had brought suit against Dutcher and the Cionci and Lynch estates, in the Common Pleas Court of Delaware County, Pennsylvania, and Harris who had sued all three in the Delaware County Court, were joined as parties in the instant declaratory judgment action on Lumbermens' motion. *Dutcher was not joined.*

At the trial in the instant declaratory judgment action, the District Court ruled that Dutcher was incompetent to testify with reference to the scope of permission granted to use his car, under the Pennsylvania Dead Man's Act, 28 P.S. 322, as far as the Lynch and Smith estates were concerned, on the ground that his interest was adverse to that of the two estates because the coverage of the policy was limited and he had an interest in maintaining its coverage for his own protection in view of the pending actions against him in the state court. The District Court then directed verdicts in favor of the Cionci and Lynch estates since no evidence had been introduced to rebut the Pennsylvania presumption that a dead man operates a borrowed automobile within the scope of his permissive use. Dutcher was, however, permitted to testify in the Harris phase of the trial, and the jury found that Cionci had not deviated from his permitted use of the automobile.

Pursuant to the verdicts stated the District Court entered a judgment declaring that "Donald Cionci was driving the motor vehicle owned by Edward S. Dutcher and insured by the Lumbermens Mutual Casualty Company under its policy . . . with the permission of Edward S. Dutcher . . . ." and that Cionci "was an insured as defined in the policy".

On this appeal, Lumbermens contends that the trial judge erred (1) in ruling that Dutcher was incompetent under the Pennsylvania Dead Man's Act as a witness against the Cionci and Lynch estates and in directing

verdicts in favor of the Lynch and Smith estates; (2) in its instructions on the score of deviation in the Harris phase of the trial, and (3) "that it was impossible for the jury to consider the Harris case impartially when it had been directed to find against Lumbermens in the Lynch and Cionci cases."

We do not reach the contentions stated because in our view we are required to vacate the Judgment of the District Court and remand with directions to dismiss the instant action for these reasons:

First, there was a failure to join an indispensable party to this action, Dutcher, the named insured in Lumbermens' policy;

Second, the District Court erred in that in the appropriate exercise of its discretion it should have denied relief without consideration of the merits in view of the fact that two pending actions in a state court, earlier referred to, in which the here absent Dutcher, as well as the Cionci, Lynch and Smith estates, and Harris, were parties, presented the critical mooted question as to the coverage of Lumbermens' policy at issue in the instant declaratory judgment action.

It must immediately be noted that the issue as to whether there was a failure to join an indispensable party to the action—Dutcher—was not presented by Lumbermens to the District Court, nor did Lumbermens urge the District Court to deny relief in the appropriate exercise of its discretion for the reasons we have stated.

First, as to the indispensable party issue:

Lumbermens' policy was one of finite limits, undisclosed in the record as a result of the District Court's pretrial ruling.

The District Court specifically held that the circumstance that the policy was one of finite limits made Dutcher's "interest" in the policy "adverse" to that of the plaintiff Lynch and Smith estates. It did so, in ruling that Dutcher was "incompetent" to testify for that reason under the Pennsylvania Dead Man's Act insofar as the

two estates were concerned. What the District Court held in that context is, of course, relevant in determining whether Dutcher was an indispensable party to the action under the indispensable party doctrine.

In its Opinion discussing its "incompetency" ruling the District Court said:

> "*The subject matter of this suit is the coverage of Lumbermens' policy issued to Dutcher. Depending upon the outcome of this trial, Dutcher may have the policy all to himself or he may have to share its coverage with the Cionci Estate,* thereby extending the availability of the proceeds of the policy to satisfy verdicts and judgments in favor of the two Estate plaintiffs. *Sharing the coverage of a policy of insurance with finite limits with another, and thereby making that policy available to claimants against the other person is immediately worth less than having the coverage of such policy available to Dutcher alone.* By the outcome in the instant case, to the extent that the two Estate plaintiffs will have the proceeds of the policy available to them in their claims against Cionci's estate, *Dutcher will lose a measure of protection.* Conversely, to the extent that the proceeds of this policy are not available to the two Estate plaintiffs *Dutcher will gain.* . . . It is sufficient for the purpose of determining adversity [of interest] that *it appears clearly that the measure of Dutcher's protection under this policy of insurance is dependent upon the outcome of this suit.* That being so, Dutcher's interest in these proceedings is adverse to the interest of the two Estate plaintiffs, the parties who represent, on this record, the interests of the deceased persons in the matter in controversy." (emphasis supplied) 218 F. Supp. 802, 805-806 (E.D. Pa. 1963).

It has been settled for more than a century and a half that a party is indispensable when his rights may be affected and that a court "cannot proceed to a final decision

of the cause" until he is made a party. Russell v. Clark's Executors, 7 Cranch 69, 98 (1812).

The indispensable party doctrine is not procedural. It declares *substantive* law and accords a *substantive right* to a person to be joined as a party to an action when his interests or rights may be affected by its outcome. The indispensable party doctrine is beyond the reach of, and not affected by, Rule 19 of the Federal Rules of Civil Procedure, since the Rules, as later developed, cannot "abridge, enlarge or modify any *substantive right*". 28 U.S.C.A. § 2072 (emphasis supplied).

Time and again, in cases later discussed, federal courts have held that Rule 19 does not apply to the indispensable party doctrine. Indeed, as subsequently developed, Rule 19 specifically excludes from its sweep "indispensable parties", and Rule 12(b) in terms provides for dismissal of an action for "failure to join an indispensable party".

There is no precedent which affords nourishment to a contention that the indispensable party doctrine is nothing more than a procedural rule within the ambit of Rule 19.

It is true that several text writers have summarily treated the indispensable party doctrine as a procedural rule without considering whether it attains the proportion of substantive law. The existence of the threshold question as to whether the indispensable party doctrine is one of substantive law was, however, recently noted by Howard P. Fink, Research Associate, Yale Law School, in his article on "Indispensable Parties and the Proposed Amendment to Federal Rule 19."[4]

Exhaustive research has failed to yield a case in which the precise issue as to whether the indispensable party doctrine is one of substantive law has been raised or decided. However, Chief Judge Aldrich of the First Circuit in a recent case[5] noted *"the view that what are indispensable parties is a matter of substance, not of procedure."* (emphasis supplied)

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4 74 Yale Law Journal 403, 430-431 (1965).
5 Stevens v. Loomis, 334 F.2d 775, 778, Note 7 (1 Cir. 1964).

Our view that the indispensable party doctrine is *substantive law,* according a *substantive right* to an absent party to be joined when his interests may be "affected by the decree", is premised on Russell v. Clark, *supra,* and the cases which declared the doctrine to be a "settled rule of equity jurisprudence", and the absence of an affected party as "fatal error", which must be recognized *sua sponte* by a trial court.

In Mallow v. Hinde, 12 Wheat. 193 (1827), which distinguished and limited to its facts, Elmendorf v. Taylor, 10 Wheat. 152 (1825), the Court in holding absent parties indispensable, said at page 198:

> "In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. *The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.*" (emphasis supplied)

> "We do not put this case upon the ground of *jurisdiction, but upon a much broader ground.* . . . We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court." (emphasis supplied)

In 1853, in Northern Indiana Railroad Company v. Michigan Central Railroad Company, 15 How. 233, 246, the Court, upon its finding that "It is impossible to grant the relief prayed, without deeply affecting the New Albany Company [which had not been joined]," declared:

> ". . . in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, *the court must refuse to exer-*

cise jurisdiction in the case, or become the instrument of injustice." (emphasis supplied)

In 1854, this classic definition of an indispensable party was enunciated in the landmark case of Shields v. Barrow, 17 How. 130, at page 139:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either *affecting that interest,* or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." (emphasis supplied) [6]

In 1870, it was ruled, in Hoe v. Wilson, 9 Wall. 501, that a court must *sua sponte* invoke the indispensable party issue even though it was not raised by a party.

There the Court said, at page 504:

> "No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence, the case cannot proceed without their presence before the court. The objection was not taken by the defendant, *but the court should, sua sponte, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made.*" (emphasis supplied)

In 1874, the indispensable party doctrine was admirably epitomized in Williams v. Bankhead, 19 Wall. 563, in this statement (p. 571):

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6 In 1868, in applying the *Shields* doctrine, in Barney v. Baltimore City, 6 Wall. 280, the Court, after defining indispensable parties as those *"whose interests* in the subject-matter of the suit, and *in the* relief sought, are *so bound up* with that of the other parties, that *their legal presence as parties* to the proceeding *is an absolute necessity,* without which the court cannot proceed," added this stricture:

> "In such cases *the court refuses to entertain the suit,* when these parties cannot be subjected to the jurisdiction". (emphasis supplied) (p. 284).

"Where a person will be directly affected by a decree, he is an indispensable party. . . ."

In the oft-quoted State of Washington v. United States, 87 F.2d 421 (9 Cir. 1936), there was enunciated what has now become landmark criteria in testing whether a party is indispensable, after it has been determined that he is interested.

The four-fold criteria there stated, at pages 427, 428, follows:

"(1) Is the interest of the absent party distinct and severable?

"(2) In the absence of such party, can the court render justice between the parties before it?

"(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?

"(4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

"If, after the court determines that an absent party is interested in the controversy, it finds that *all* of the four questions outlined above are answered in the *affirmative* with respect to the absent party's interest, then such absent party is a *necessary party.* However, if *any* one of the four questions is answered in the *negative,* then *the absent party is indispensable.*" (emphasis supplied)

It is important to note, that in its discussion of the indispensable party question, the Court said, at pages 427, 428:

"In cases where there is error in nonjoinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the

error as 'jurisdictional'. The defect is not, properly speaking, a jurisdictional one. . . .

"The nonjoinder of an indispensable party is *fatal error,* and the court *cannot* proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder *would oust the court of jurisdiction.* Neither the statute [Act of March 3, 1911, ch. 231 § 50, 36 Stat. 1101] nor the equity rule [Rule 39 of the Equity Rules of 1912, 28 U.S.C.A. following section 723], . . . permit the court to proceed in the absence of an indispensable party." (emphasis supplied)

The indispensable party doctrine as declared in *Shields* and *State of Washington* was applied in Commonwealth Trust Company v. Smith, 266 U.S. 152 (1924) and Niles-Bement-Pond Company v. Iron Moulders Union, Local No. 68, 254 U.S. 77 (1920).

This court has time and again likewise done so.

In Samuel Goldwyn, Inc. v. United Artists Corporation, 113 F.2d 703 (1940), we held that an absent party is indispensable if his interest is "joint" with that of either plaintiff or defendant, and that the doctrine applies to declaratory judgment actions.

In Baird v. Peoples Bank & Trust Co. of Westfield, 120 F.2d 1001 (1941), we specifically held, citing *Shields* and *State of Washington,* that an absent party is indispensable, "if the decree will have an *injurious* effect upon his interest." We there affirmed the District Court's dismissal of a complaint in an action brought by life tenants insofar as it related to the corpus of a trust fund, for failure to join remaindermen who were found to be indispensable parties.

In United States v. Washington Institute of Technology, Inc., 138 F.2d 25 (1943), in affirming the District Court's dismissal of an action for nonjoinder of an indispensable party, we ruled that the requirement in Rule

19(a) that those who have a "joint interest" must be joined referred to parties who were "indispensable" prior to the Rule.

In doing so we said at pages 25-26:

> "Rule 19(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, requires that those having 'a joint interest shall be made parties. . . .' *This means those who were indispensable parties prior to the rules.* 2 Moore's Federal Practice (1938) § 19.02. As described in the leading case upon the matter, *they were persons who had such an interest that any final decree rendered had to affect that interest.* Shields v. Barrow, 1854, 17 How. 130, 15 L. Ed. 158." (emphasis supplied)

In Chidester v. City of Newark, 162 F.2d 598 (1947), we again declared (p. 600):

> ". . . *indispensable parties under Rule 19 are those who were indispensable prior to the rules;* they have such an interest in the controversy that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience." (emphasis supplied)

And, in Hook v. Hook & Ackerman, 187 F.2d 52 (1951), we stated in note 7, page 60:

> "Rule 19(a) uses the term 'joint interest', stating that those having such an interest 'must' be joined. *This provision applies to parties who were indispensable under the previous practice.*" (emphasis supplied)

The courts of appeals in other circuits have in recent years attested to the continuing unimpaired vitality of the indispensable party doctrine as declared in *Shields*

and the Supreme Court cases which preceded and followed it.

In 1964, the First Circuit, in Stevens v. Loomis, 334 F.2d 775, declared (p. 777): "*where the interests of the absent party are inextricably tied in to the cause*" he is a "*true indispensable party*", and "A court *cannot proceed* in the absence of an indispensable party."[7] (emphasis supplied)

Again, in 1964, the Fifth Circuit, in Hilton v. The Atlantic Refining Company, 327 F.2d 217, in citing and applying *Shields* and *Mallow v. Hinde, supra,* declared (p. 218):

> "*An indispensable party is one whose relationship to the matter in controversy in a suit in equity is such that no effective decree can be entered without affecting his rights.*" (emphasis supplied)

In 1961, the Ninth Circuit, in Stumpf v. Fidelity Gas Co., 294 F.2d 886, in holding that absent parties were not there indispensable because, inter alia, the judgment sought in the action "*would have no injurious effect upon the interest of any absent party*", applied the criteria for testing whether an absent party is indispensable which had been laid down in *State of Washington v. United States, supra.* (emphasis supplied)

In 1960, the indispensable party doctrine was applied, in a situation strikingly analogous in critical respects to that prevailing here, in United States v. Fried, 183 F. Supp. 371 (E.D. N.Y.).[8] Fried was insured under eight life insurance policies of the New York Life Insurance Company. The United States, which had an income tax lien against Fried, brought an action against him and the insurance company seeking a judgment directing the insurer to pay to the government the cash surrender value of three of

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7 In *Stevens* it was held that the absent party was only a "necessary" party because it was not within the "classic definition of an indispensable party."

8 Aff'd on other grounds, 309 F.2d 851 (2 Cir. 1962).

the policies and the disability benefits due Fried under the five other policies. One Ilene Fried was the named beneficiary in the eight policies. Fried had reserved in the policies the right to receive their cash surrender value and to change his beneficiary. The District Court, nevertheless, held that the beneficiary was an indispensable party under *Shields*, stating at page 373:

> "The granting of the Government's prayer for relief *will either diminish or completely extinguish her rights as beneficiary. It is apparent, therefore*, that the case at bar is governed by the rule of Shields v. Barrow, supra, and *that the beneficiary is an indispensable party to this action.*"[9] (emphasis supplied)

It must also be noted that it has been held (1) "there is a complete identity of interest as between the insurance carrier and the insured" under an automobile liability insurance policy of the type involved in the instant case, Fireman's Fund Insurance Company v. Dunlap, 317 F.2d 443, 446 (4 Cir. 1963); and (2) since "The interests of the insurer and insured are identical" their "interests" are "joint": State Farm Mut. Automobile Ins. Co. v. Hugee, 115 F.2d 298, 302 (4 Cir. 1940).

What has been said establishes that under settled law, it was mandatory upon the District Court *not* to proceed to a decree in this action in view of the fact that its finding as to the action's potential drastic effect upon Dutcher made him an indispensable party.

The distilled essence of the cases discussed is that one whose interests or rights will be adversely affected by the outcome of an action has a *substantive* right to be joined as a party, and that the right forecloses a trial court from proceeding "to a final decision of the cause" until he is joined as a party.

"Equitable principles", standing alone, cannot be recruited to thwart or avoid the impact of the indispensable

9 The District Court in that case ordered the dismissal of the complaint should the government fail to join the beneficiary as a party defendant.

party doctrine where "a decree will have an injurious effect upon the interest" of an absent party. Equitable considerations are an element of the criteria to be applied in determining whether a party is indispensable but they are not operative where the element of "injurious effect on the interest of the absent party" is present. *State of Washington v. United States, supra.*

A declaratory judgment proceeding cannot be viewed as an action "equitable in nature". It was settled by Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 240-241 (1937) that "the operation of the Declaratory Judgment Act *is procedural only*" and that the Act was designed to afford "an immediate and definitive determination of *the legal rights of the parties.*" (emphasis supplied)

The *"procedural limitations"* of the Declaratory Judgment Act were re-asserted in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672 (1950).

The cases cited in support of the view that (1) a declaratory judgment proceeding "is equitable in nature", and (2) "equitable principles" prevail in the determination of the fact whether an absent party is "indispensable", afford neither support nor nourishment to that view.

Neither A. L. Mechling Barge Lines, Inc., 368 U.S. 324 (1961), nor Brillhart v. Excess Insurance Company, 316 U.S. 491 (1961), cited in support of the first point, even remotely suggest that declaratory judgment proceedings are "equitable in nature."

Three other cases, subsequently discussed, cited in support of the second point are inapposite on their facts. First and foremost, all three were *actions in equity* and not declaratory judgment proceedings; second, in two, equitable relief was granted on express findings that such relief would *not* "injuriously affect the interest" of an absent party, and in the third, relief was denied for the reason that absent parties were "indispensable" because their interests would be affected.

In Payne v. Hook, 7 Wall. 425 (1868) it was merely held that an heir could sue the administrator of her brother's estate for alleged misconduct without joining other heirs since the trial court could have proceeded to a decree "without injury" to the absent heirs, because "the controversy is not with them, but with the administrator and his sureties", and further, the absent heirs would in fact reap the benefits of the action.

There is nothing in *Payne* which justifies its citation as a flexible and imaginative adaptation of remedies in disregard of the indispensable party doctrine, or as a "relaxation" of that doctrine.

Nor does Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), justify its citation as an instance of a "relaxation" of the indispensable party doctrine. There, the Supreme Court only held that it would not grant a motion to be formally joined as a party to a pending appeal because the movant "has been permitted as *amicus* to brief and argue its position before this Court", and "In these circumstances we are not persuaded that the admission of C.A.V. [the movant] as a party is necessary *at this stage* to safeguard any claim either that it has already presented or that it may present in the future course of this litigation". (emphasis supplied)

Similarly, in Waterman v. Canal-Louisiana Bank & Trust Company, 215 U.S. 33 (1909) where a *bill in equity* sought to determine the interest of an heir in an alleged lapsed legacy and the consequent increase in the residuary estate, it was held that an absent nonresident heir could not be regarded as an indispensable party whose absence would defeat the jurisdiction of a court in equity, because the decree sought could be entered "without prejudice to the rights" of the absent heir.

In so holding the Court said (p. 49):

> "The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually be-

fore the court *without injuriously affecting the rights of such absent party.*

"If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. . . .

". . . while Davis [the absent heir] is a necessary party, in the sense that he has an interest in the controversy, his interest is not that of an indispensable party, without whose presence a court of equity cannot do justice between the parties before it, *and whose interest must be so affected by any decree to be rendered as to oust the jurisdiction of the court".* (emphasis supplied)

In Roos v. Texas Co., 23 F.2d 171 (2 Cir. 1927), cert. den. 277 U.S. 587 (1928), also cited, the Court affirmed the District Court's dismissal of a *bill in equity* which sought an accounting, *on the ground of absence of indispensable parties* whose interests would be affected by the outcome of the action.

In doing so, Judge Learned Hand, speaking for the Court, said (p. 173):

". . . the case appears to us to be one *where the rights of the beneficiaries* [in proceeds of a lease] *are so entangled with one another that it is practically impossible in the decree to protect those who are absent. They are indispensable to any dealing with the case at all."* (emphasis supplied)

There is nothing in Judge Hand's opinion which affords an iota of support for the view that he considered the feasibility of fashioning a decree adequate to preserve an attorneys' lien so that the suit might proceed notwithstanding their absence as parties. The fact of the matter is that Judge Hand *rejected* the notion that a decree could

be entered impounding proceeds of the lease, on the ground that such action would be "in substance a denial of any relief at all."

As in *Roos v. Texas, supra,* the instant case is "one where the rights" asserted by those seeking recourse to the benefits of Dutcher's policy, and Dutcher's rights to the protection accorded to him by the policy, "are so entangled with one another that it is *practically impossible in the decree to protect those who are absent* [Dutcher]" and he is, accordingly, "*indispensable to any dealing with the case at all.*" (emphasis supplied)

Coming now to the minority's view that the indispensable party doctrine is nothing more than a "procedural rule", within the ambit of Rule 19 of the Federal Rules:

It must immediately be observed, on this score, that the minority has failed to note that Rule 12(b)(7) provides in explicit terms that a claim must be dismissed for "failure to join an indispensable party"[10], and that Rule 19, in terms, relates only to "necessary parties" and specifically excludes from its sweep "indispensable parties."[11]

Rules 12 and 19 preserve rights accorded by the indispensable party doctrine. They afford no basis for the view that Rule 19 may be resorted to in determining whether there has been a failure to join an indispensable party.

It was squarely held in Calcote v. Texas Pac. Coal & Oil Co., 157 F.2d 216 (5 Cir. 1946), cert. den. 329 U.S. 782, that Rule 19 does not apply to indispensable parties.

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10 Rule 12(b) provides in relevant part:

"Every defense . . . to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (7) failure to join an indispensable party."

11 Rule 19, captioned "Necessary Joinder of Parties", provides in relevant part, in sub-division (b):

"Effect of Failure to Join:

"When persons who are not indispensable. . . ."

It was there said (p. 219):

> "Section 50 of the Judicial Code [Act of March 3, 1911, c.2317] and *rule 19(b)* of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, *do not apply to indispensable parties,* who must be made parties to the suit even though this will defeat federal jurisdiction". (emphasis supplied)

Further, the Court in denying a petition for rehearing said (p. 225):

> ". . . every indispensable party must be brought into court, actually or constructively, or the suit will be dismissed if a substantial claim is stated in the complaint. It is axiomatic that indispensable parties cannot be dispensed with in diversity cases even though their presence will defeat federal jurisdiction."

The Court's citation, in *Calcotte* in note 3 page 225, of Dobie on Federal Procedure is of critical relevance in view of the fact that Judge Dobie therein specifically declared that both Section 50 of the Judicial Code and Equity Rule 39, *predecessor of Rule 19 of the Federal Rules,* "do not apply to indispensable parties."

At pages 217-218 of his admirable treatise, Judge Dobie said:

> "An indispensable party is one without whom the suit cannot proceed, one in whose absence the court could not enter a decree. His relation to the suit is so direct and vital that without him no adequate decree could be entered, determining the rights of other parties. Even in his absence, any decree would affect his interest. It is therefore clear that such parties must of necessity be before the court. *Accordingly, section 50 of the Judicial Code (28 USCA § 111) and equity rule 39 do not apply to indispensable parties, who must be parties to the suit, even though this will defeat the federal*

jurisdiction. There can be no dispensing with indispensable parties.

"Thus if A, B, and C each separately claim all of an entire fund, they are all indispensable parties to a suit concerning the disposition of the fund; for an award of any part of the fund to one is necessarily a decision, as to this part, against the other two." (emphasis supplied)

In Young v. Powell, 179 F.2d 147 (5 Cir. 1950), cert. den. 339 U.S. 948, it was held that Rule 19 requires dismissal of an action where an indispensable party has not been joined.

The view that Rule 19 sets the standard by which the existence of an indispensable party may be determined was specifically rejected in Stumpf v. Fidelity Gas Co., 294 F.2d 886 (9 Cir. 1961).

There the Court said (p. 890):

"This brings us to the question whether the omitted parties here are indispensable within the meaning of that term and as defined in the adjudicated cases. It is not sufficient for a defendant to demonstrate that these persons would be 'proper' or 'necessary' parties within the meaning of Rule 19, F.R. Civ. P., 28 U.S.C.A. *Those rules were not intended to and did not effect any alteration in the standards by which the existence of an indispensable party may be determined.*" (emphasis supplied)

Rule 19 does not, and cannot, effect any alteration, either by way of modification or extension, in the standards by which the existence of an indispensable party may be determined.

The Rule neither "giveth nor taketh away" the *substantive* right of an absent party whose interest may be directly affected by a judgment to be joined as a party to the action. The federal statute enabling the Supreme

Court to promulgate the Rules of Civil Procedure commands that *"Such rules shall not abridge, enlarge or modify any substantive right."* [12] (emphasis supplied)

The principle that rules of federal practice do not apply to indispensable parties was first declared in *Shields*. It was there said at 17 How. 139:

> *"Neither the Act of Congress* of February 28, 1839, 5 Stat. at L. 321, sec. 1, *nor the 47th rule for the equity practice of the circuit courts of the United States, enables a circuit court to make a decree in equity, in the absence of an indispensable party,* whose rights must necessarily be affected by such a decree." (emphasis supplied)

And at pages 141-142 it was said:

> "So that, while this Act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned [Mallow v. Hinde, 12 Wh. 198]. And the 47th rule is only a declaration for the government of practitioners and courts, of the effect of this Act of Congress, and of the previous decisions of the court, on the subject of that rule. Hagan v. Walker, 14 How. 36. *It remains true, notwithstanding the Act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person,* that

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12 The enabling Act of June 19, 1934, as amended, 28 U.S.C.A. § 2072, provides in relevant part:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

complete and final justice cannot be done between the parties to the suit without affecting those rights." (emphasis supplied)

The leading case of *State of Washington v. United States, supra,* held to the same effect, stating at 87 F.2d 428:

"Neither the statute nor the equity rule . . . permit the court to proceed in the absence of an indispensable party."

That rules of practice cannot "abrogate or modify the substantive law" was declared in Washington-Southern Navigation Company v. Baltimore & Philadelphia Steamboat Company, 263 U.S. 629 (1924). There, the Court was asked to construe the sweep of Rule 50 of the then new Admiralty Rules, promulgated in 1920.

Mr. Justice Brandeis, speaking for the Court, said (pp. 635-636):

"The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. . . . But no rule of court can enlarge or restrict jurisdiction. *Nor can a rule abrogate or modify the substantive law.* This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred." (emphasis supplied)

The present Federal Rules of Civil Procedure, promulgated by the Supreme Court under the authority of

the Act of June 19, 1934,[13] and its subsequent amendments,[14] are restricted in their operation to matters of pleading and procedure and they "do not modify, abridge or enlarge substantive rights."

The Supreme Court has so held in Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1941) and United States v. Sherwood, 312 U.S. 584 (1941).

In *Sibbach* the Court said at pages 7 and 8:

> "The Rules of Civil Procedure were promulgated under the authority of the Act of June 19, 1934, which is:
>
> " 'Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. . . .' "

and at page 10:

> "Hence *we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction.* The first is that *the court shall not 'abridge, enlarge, nor modify substantive rights,' in the guise of regulating procedure.*" (emphasis supplied)

In *United States v. Sherwood, supra,* the Court said (pp. 589-90):

> "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; *and the Act*

13 48 Stat. 1064, 28 U.S.C.A. § 723b.
14 28 U.S.C.A. § 2072.

> *of June* 19, 1934, 48 Stat. 1064, 28 U.S.C. 723b, *authorizing this Court to prescribe rules of procedure* in civil actions *gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.*" (emphasis supplied)

In Perry v. Allen, 239 F.2d 107 (5 Cir. 1956), it was held that the then existing provision in Rule 25(a) (1) F.R.C.P. requiring substitution within two years after the death of a party "is invalid insofar as it attempts *to abridge appellant's substantive right* to bring his civil action to trial on its merits, by placing a categorical and inflexible time limit upon his right to substitute the collector's administrator." (emphasis supplied) (p. 112).

The Court prefaced its holding with this statement (pp. 111-112):

> "It is plain that these Rules are designed to provide the machinery for the administration of justice, the modes of proceeding by which legal rights are enforced; and *do not purport to deal with the law which gives or defines such rights, or their character, or the existence or boundaries of the remedies vouchsafed for the establishment of those rights. . . .*" (emphasis supplied)

It may be noted parenthetically that the condemned provision in Rule 25(a)(1), requiring substitution within two years after the death of a party, was deleted in 1963 by amendment.

The "procedural nature" of the Federal Rules of Civil Procedure, and their sterility with respect to *matters of substantive right* was noted in United States v. United States Casualty Company, 218 F. Supp. 653 (D. Del. 1962). It was there said (p. 656):

> "First, the suit, of course, is filed pursuant to the Federal Rules of Civil Procedure. *Those Rules, as*

the name indicates, are of a procedural nature, leaving matters of substantive right to be otherwise determined." (emphasis supplied)

These final observations are in order in concluding discussion of the indispensable party issue:

The command of the indispensable party doctrine that a "court cannot proceed to a final decision" where an absent party "may be so much affected by the decree"[15] is bare of "ifs, ands, and buts" and it has been given effect in more than three hundred cases in federal and state courts.

Coming now, and as briefly as possible, to our view that the District Court should have denied relief by way of declaratory judgment, without consideration of the merits, in the appropriate exercise of its discretion, since two pending actions in a state court, in which Dutcher and all the persons involved in the accident were parties, presented the mooted question as to the coverage of the policy.

At the time the instant declaratory judgment proceeding came to trial there had been pending for almost two years in the Common Pleas Court of Delaware County, two actions arising out of the collision between Dutcher's car and a truck operated by Smith. In one, the Smith estate sued Dutcher and the Lynch and Cionci estates; in the other, Harris sued them. The complaint in each action alleged that Cionci was driving at the time of the accident with Dutcher's permission and on his business and that Cionci was under Lynch's "control".

Since Cionci's estate was admittedly insolvent, Smith's estate and Harris, if they succeeded in obtaining verdicts against it, could only realize on their verdicts if the coverage of Dutcher's policy extended to Cionci. And of course, any verdicts they obtained against Dutcher would also involve recourse to the protection of his policy.

The Delaware County court in trying the two actions would have been required, as was the District Court, to

15 Russell v. Clark's Executors, 7 Cranch 69, 98 (1812).

rule on the question as to whether the Pennsylvania Dead Man's Rule would operate to bar Dutcher from testifying with respect to the scope of the permission which he had granted to Cionci and/or Lynch for the use of his car. The dimensions of the problem attending resolution of this question are attested to by the fact that District Judge Van Dusen, in the pre-trial stages of the instant action, held that the Dead Man's Rule did not preclude Dutcher's testimony while District Judge Luongo, who presided at the trial, ruled to the contrary.

It may be noted parenthetically that Dutcher, Cionci, Lynch, Smith and Harris were by coincidence all residents of Bryn Mawr, Pennsylvania, near the scene of the accident.

The considerations stated inescapably lead to the conclusion that the District Court erred in disregarding them, and in failing to dismiss the declaratory judgment action by reason of their existence. We are charged with the duty to rule on the issue as to whether the District Court abused its discretion even though it failed to recognize that the question of exercise of discretion was presented by the facts. As was said in *A. L. Mechling Barge Lines, Inc. v. United States, supra* at page 331:

> "Declaratory judgment is a remedy committed to judicial discretion. *Nor need this Court first have the view of a lower court before it may decide that such discretion ought not be exercised.*" (emphasis supplied)

The Supreme Court has laid down these guide-lines with respect to a district court's exercise of discretion in a declaratory judgment action:

> *"Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law."* Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237, 248 (1952) (emphasis supplied)

* * *

> "Where a District Court is presented with a claim such as was made here [to declare rights under an insurance policy], *it should ascertain whether the questions in controversy* between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, *can better be settled in the proceeding pending in the state court.* This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. *The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.*" Brillhart, Administrator v. Excess Insurance Company of America, 316 U.S. 491, 495 (1942) (emphasis supplied)

The stated guide-lines were applied in Doby v. Brown, 232 F.2d 504 (4 Cir. 1956), where the dismissal of a declaratory judgment action was affirmed. There the late Chief Judge Parker, speaking for the Court, said at page 506:

> "In so far as the suit asked a declaratory judgment, and plaintiffs' brief in this court asserts that it was instituted under the Declaratory Judgments Act, 28 U.S.C. § 2201, *it is well settled that the granting of declaratory relief is a matter resting in the sound discretion of the trial judge and that it ought not be exercised to try a case piecemeal or to drag into the federal courts matters properly triable before the courts of the state.*" (emphasis supplied)

In the instant case the District Court did not give effect to the guide-lines established in the foregoing cases and improvidently exercised its discretion in failing to deny relief without consideration of the merits.

For that reason, and the further reason that there was a failure to join an indispensable party to this action—

Dutcher, the named insured in Lumbermens' policy—the Judgment of the District Court will be vacated and the cause remanded with directions to dismiss the action.[16]

FREEDMAN, *Circuit Judge*, dissenting.

I dissent because I believe we can preserve the jury's determination of the factual issue whether Cionci was driving Dutcher's automobile within the limits of his permission. To speak of the discretionary power of a trial

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16 This, too, must be said with respect to the minority's view that the interests of Dutcher—the absent indispensable party—can be "protected" by fashioning a decree which would stay the execution of the District Court's present declaratory judgment until Dutcher shall have had a full opportunity, either in the District Court or in a state court, to present any claims he may have to the protection of Lumbermens' policy as a result of the determination of the state court actions against him:

A declaratory judgment under Section 2201 must be of a *"conclusive character"* and *"an immediate and definitive determination of the legal rights of the parties"*. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937). It must *"settle legal rights* and *remove uncertainty and insecurity from legal relationships"* and *"it should not be accorded . . . to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted."* Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321, 325 (4 Cir. 1937). (emphasis supplied)

The suggested decree not only fails to conclusively and definitely determine and settle the legal rights of the parties to this action, and "remove uncertainty and insecurity from legal relationships", but it *specifically* makes legal rights and legal relationships of the parties contingent and conditional upon events still to transpire, viz., the unpredictable future outcome (1) of the pending actions in the state court brought by the Smith estate and Harris against the Lynch and Cionci estates, and the here absent Dutcher, and (2) any further proceeding in the District Court in which Dutcher should present his claims to the protection of Lumbermens' policy.

The suggested decree not only transgresses the permissible limits of the Declaratory Judgment Act and offends its design, but its conditional and contingent provisions are "in substance a denial of any relief at all [to the plaintiffs]," as was said by Judge Learned Hand in Roos v. Texas Co., 23 F.2d 171, 173 (2 Cir. 1927), cert. den. 277 U.S. 587 (1928), in refusing to enter the there suggested decree.

As was well said in Doehler Metal Furniture Co. v. Warren, 129 F.2d 43 (D.C. Cir. 1942), cert. den. 317 U.S. 663, at page 46:

> "The giving of a declaratory judgment in this case would be in effect an unwarranted enlargement of the District Court's jurisdiction. . . . *It is well enough to be attuned to the use of new remedial concepts, but it is something else to increase jurisdiction beyond the other provisions of law by a clever use of remedies.*" (emphasis supplied)

judge to refuse to entertain a declaratory judgment proceeding, therefore, is unreal where the case already has been tried and decided. The question now is not whether the case should have been heard, but rather whether the factual decision which has already been made should now be cast aside and the parties required to relitigate what has been fairly decided. I believe the second ground for dismissal of the action, that Dutcher is an indispensable party, is a mistaken one, violates the Supreme Court's recently promulgated new Rule 19 and unjustifiably puts its validity in question.

Although on the surface the case appears to be one of simple automobile liability coverage, it has assumed significant proportions as a result of the majority's views. It is therefore necessary that I fully express the reasons for my dissent.

I.

Dutcher's Non-joinder as a Party.

The majority holds that Dutcher's absence as a party is a "jurisdictional" defect which requires the automatic dismissal of the action, even though it was not asserted by the parties but was raised by us on appeal. I shall consider the problem first as it existed when the case was argued and reargued before us, prior to July 1, 1966, the effective date of the recent amendments to the Federal Rules of Civil Procedure, and then discuss the effect of the amendments.

The old Rule 19 dealing with the necessary joinder of parties was a procedural provision for the administration of the long-standing judicially established principles developed in the case law which marked out the occasions when a case should proceed despite the absence of an interested person. The body of the doctrine was found in the precedents by which it had developed and the procedure for its administration was provided by the old Rule 19.

The requirement of joinder originated in equity practice[1] where the presence of all "indispensable" parties was considered necessary so that complete justice might be done. *Shields v. Barrow*, 58 U.S. (17 How.) 130 (1854); *Hoe v. Wilson*, 76 U.S. (9 Wall.) 501, 504 (1869).[2] In *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166-67 (1825), where plaintiff, a tenant in common with others, was permitted to sue in equity without making his cotenants parties to the suit, Chief Justice Marshall said: "Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the Court itself, and is subject to its discretion. It is not, like the description of parties, an inflexible rule, a failure to observe which turns the party out of Court, because it has no jurisdiction over his cause; but, being introduced by the Court itself, for the purpose of justice, is susceptible of modification for the promotion of those purposes." This statement was quoted in substantial part and reaffirmed in *Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 197 (1827).

From the earliest times courts have been guided in determining indispensability by practical considerations.[3] The decision whether a person is indispensable therefore depends upon a consideration of all the elements which bear on the justice of requiring joinder in the circumstances of the particular case, or to speak in more familiar terms, upon equitable principles. The label "indispensable party" therefore has always been in truth more a statement of

1 See 2 Barron & Holtzoff, Federal Practice & Procedure (Wright ed. 1961), § 511; 3 Moore's Federal Practice (2d ed. 1963), ¶¶ 19.05, 19.19. See also Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Colum. L. Rev. 1254 (1961).

2 See Parker Rust-Proof Co. v. Western Union Telegraph Co., 105 F.2d 976 (2 Cir. 1939); Benger Laboratories, Ltd. v. R. K. Laros Co., Inc., 24 F.R.D. 450 (E.D.Pa. 1959), on merits, 209 F.Supp. 639 (E.D.Pa. 1962), affirmed, 317 F.2d 455 (3 Cir. 1963), cert. denied, 375 U.S. 833 (1963). See also Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957).

3 For this reason suits against subordinate officials, without joinder of the superior, have been sustained. See Shaughnessy v. Pedreiro, 349 U.S. 48, 54 (1955).

result than of cause,[4] since the elements which are decisive of indispensability are also those which go to determine whether the suit should proceed in the absence of the interested person.

The equitable considerations governing the determination of indispensability were classically stated in *Shields v. Barrow, supra:* "Persons [are indispensable] who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. . . ." (58 U.S. (17 How.), at 139).

As the doctrine of *Shields v. Barrow, supra,* has developed, equitable considerations have been paramount. If it is possible to render an effectual judgment between those who are present as parties to the action without a substantial adverse effect on the rights of the absent person, the action will not be dismissed. This principle has led the courts to mould their decisions by flexible and imaginative adaptation of remedies in order to avoid either the dismissal of a suit or the imposition of an adverse effect on the absent person.[5] It follows that indispensability is not

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4 Reed, supra, n. 2, at 346. Fink, Indispensable Parties and the Proposed Amendment to Federal Rule 19, 74 Yale L.J. 403, 415 (1965), while criticizing the then proposed amendment, agrees with the need to look to practical considerations in determining whether an absent person is indispensable. See also infra, n. 16.

5 In Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868), a next of kin of a deceased intestate sued the public administrator of the estate, seeking an accounting and the payment of her true share of the estate. Although other distributees were not made parties, the court reversed the dismissal of the complaint, saying that the general rule requiring the joinder of all persons materially interested in the subject matter of the suit "will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit. . . ." (p. 431). The court directed that the suit should proceed on the ground that if it terminated in a decree against the defendants substantial justice would be done to all the parties in interest and a multiplicity of suits prevented by allowing the other distributees to come in and share in the benefits of the litigation, either through a reference to a master or in other appropriate proceedings. (p. 432).

In Roos v. Texas Co., 23 F.2d 171 (2 Cir. 1927), Judge L. Hand considered the feasibility of fashioning a decree adequate to preserve an attorneys' lien so

determined by an academic or mechanical classification of the absent person. The decision depends rather on all of the elements which bear on the particular case.

A number of cases have already been decided in which the insured was not treated as indispensable in an action between the tort claimant and the insurer.[6] In the circumstances which surround the present proceeding, the interests of justice call strongly for the preservation of the jury verdict. In the absence of a conflicting claim by Dutcher to his own protection under the policy, which has fixed limits,[7] he will not be injured in any way by a judgment that the insurer will be liable for any judgments obtained against Cionci. And in the event that the aggregate recoveries against Cionci's estate and Dutcher should exceed the policy limits so that their interests would come into collision, Dutcher would have the right at that time to make his claim of superiority over Cionci's estate to indemnity from the fund created by the policy. In making such claim he would be free to litigate the question whether Cionci was driving with his permission at the time of the accident; since he is not a party he will not be foreclosed by collateral estoppel.[8] In any event a race to collect

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that the suit might proceed notwithstanding their absence as parties, but concluded that no decree would adequately do so.

See also Mallow v. Hinde, 25 U.S. (12 Wheat.) 193, 198-99 (1827); Russell v. Clark's Executors, 11 U.S. (7 Cranch) 69, 98 (1812).

6 Northwest Cas. Co. v. Kirkman, 119 F.Supp. 828 (M.D.N.C. 1954); Ohio Casualty Ins. Co. v. Maloney, 44 F.Supp. 312 (E.D.Pa. 1942); Nationwide Mutual Ins. Co. v. Simms, 231 F.Supp. 787, 792 (D.Md. 1964); Glen Falls Indemnity Co. v. Fredericksen, 8 F.R.D. 55 (D.Neb. 1947); Congregation Ahavath Achim v. Underwriters At Lloyd's of London, 31 F.R.D. 275 (D.Ore. 1962). See also Western Casualty & Surety Co. v. Beverforden, 93 F.2d 166 (8 Cir. 1937), holding driver-tortfeasor not indispensable.

7 In the pretrial proceedings the court ordered that Lumbermens need not reveal the policy limits, although it was required to state whether they equalled or exceeded $10,000 so as to determine whether the jurisdictional amount was met. The jurisdictional amount was then acknowledged. The undisclosed policy limits are fixed, for the policy provides that the "inclusion herein of more than one insured shall not operate to increase the limits of the company's liability".

8 Under Pennsylvania law, which determines the scope of collateral estoppel (see Hartmann v. Time, Inc., 166 F.2d 127, 138 (3 Cir. 1947), cert. denied, 334 U.S. 838 (1948), Boulter v. Commercial Standard Ins. Co., 175 F.2d 763, 768 (9 Cir. 1949)), Dutcher's mere appearance as a witness is not enough to have

against the fund can readily be guarded against by a provision in the decree that Lumbermens shall not be required to make any payment under the policy until Dutcher has had an opportunity to present any claims he may have as a result of the determination of the state court actions.[9] This would only make express what is implicit in the refusal of the court below to include in the declaratory judgment a provision that Lumbermens' policy is available to satisfy any judgments which any of the plaintiffs may obtain against Cionci's estate and directing Lumbermens to pay the judgment which Lynch's estate had already obtained against Cionci's estate. Any other practical contingencies which imagination may suggest are of no legal consequence.[10] In this regard Dutcher and Cionci's estate

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him treated as in substance a party. Woodburn v. Pennsylvania Railroad Co., 294 Pa. 174 (1928). Nor is he in privity with Lumbermens, for Lumbermens has no interest beyond the amount of its policy, while Dutcher's real interest is precisely in the excess judgment, which alone would provide the occasion for his relitigation of the issue of Cionci's coverage. The relationship of Dutcher and Lumbermens is analogous to that of indemnitee and indemnitor, in which the indemnitee is not bound by a third party's judgment against the indemnitor even though the indemnitor would be bound by a judgment against the indemnitee. See Restatement of Judgments, § 107(b), comment k. And, of course, the fact that Dutcher would have been entitled to the benefit of the judgment in this action if it had been in favor of Lumbermens (see Hinchey v. Sellers, 7 N.Y. 2d 287, 165 N.E. 2d 156 (1959)), will not bind him to a judgment which went the other way. For in the former instance, as we said, in Makariw v. Rinard, 336 F.2d 333, 335 (3 Cir. 1964), "the party foreclosed has litigated the critical issue. . . ." See also Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 33-4 (1957), cert. denied, 355 U.S. 832 (1957); Bernhard v. Bank of America Nat'l. Trust & Sav. Ass'n., 19 Cal. 2d 807, 122 P.2d 892 (1942); Bruszewski v. United States, 181 F.2d 419 (3 Cir. 1950), cert. denied, 340 U.S. 865 (1950).

9 See Waterman v. Canal-Louisiana Bank, 215 U.S. 33, 49-50 (1909), where the court said: "If [the court] finds the issue in favor of the complainant, it may proceed to determine the proportion in which the complainant and [the present defendants] . . . are entitled to share, without prejudice to the rights of [the absent defendant]. It may direct the retention of his share in the hands of the executors, to be adjudicated in some other suit, or may otherwise shape its relief so as to do justice to the parties before the court without affecting his interest." See also Pennock v. Coe, 64 U.S. (23 How.) 117, 131 (1859), where one of the reasons the court refused to allow plaintiff to collect on his judgment was that other bondholders of the same priority were not parties to the suit. The court said that when a fund is insufficient to meet the claims of all creditors, there should be no distribution until all the claimants are present for a pro rata distribution.

10 Illustrations are given by Hazard, cited supra, n. 1, at 1288-89, n. 183: "Of course, an absent party may be prejudiced by the stare decisis effect of a decision, but surely no one will urge that all persons must be joined in a suit

are not unlike joint tortfeasors, each of whom would naturally prefer the joinder of the other in order that contribution might be assured. But one joint tortfeasor cannot escape suit because his fellow joint tortfeasor has not been named as a defendant in the same litigation. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 330 (1955).

Dutcher not only will suffer no harm by his absence from the present action; he can gain nothing by being joined. Indeed Dutcher would probably consider adverse to his interest a requirement that he join. For he refrained from intervening under Rule 24 and thus is not bound by the judgment adverse to Lumbermens, even though he would have benefited had the judgment been in its favor. *Makariw v. Rinard, supra.*

Nor does Dutcher's absence preclude our rendering a judgment consistent with equity as between the present parties. It is, of course, here that the full utility, though not the finality, of the plaintiffs' judgment is subject to the outcome of the suits against Dutcher. But in this respect it is of the utmost significance that the question of Dutcher's non-joinder was not raised by any of the parties [11] but was first initiated by us at the argument of the appeal, after the action had been tried by a court and jury and more than eight years have now gone by since the accident

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the decision of which may sometime serve as an adverse precedent. An absent party may also be prejudiced by the parties' *acting in accordance* with a decree or judgment, as when a fund is distributed to creditors. But this prejudice does not result from the fact that the absentee is bound by the judgment, but because the practical value of a later suit by him may be impaired by the change of out-of-court circumstances. The prospect of such impairment is indeed a factor to be considered in determining who should be joined, *i.e.*, who are necessary parties. . . . But the sole fact of such impairment is not ground for refusing to proceed, any more than the fact that a debtor's payment of a judgment will impair his ability to pay others is ground for refusing to proceed with a creditor's suit." Hazard goes on to point out: "And in no event can such a practical impairment occur when . . . the judgment is simply declaratory, not requiring or involving change in out-of-court circumstances affecting the practical position of the absentee."

11 The 1966 amendment to Rule 12(h)(2) would indicate, as would the comments of the Advisory Committee on that section and on the amended Rule 19, that the objection of the failure to join a party comes too late after trial on the merits.

occurred.[12] The question, therefore, is not whether the district court in the exercise of its undoubted discretionary power[13] should have initially dismissed the action before allowing it to go to trial. There now exists a new element which has entered into the consideration of the exercise of equitable discretion since the case was first brought in the district court,—the jury's factual finding. This factual determination, fairly made, of the issue of Cionci's deviation in the use of Dutcher's car, must now be preserved if it is possible to do so. For if it should turn out that the total amount of the judgments against Cionci's estate and Dutcher does not exceed the limits of the policy, there will be no conflict between Dutcher and Cionci's estate over the coverage of the policy, and the controversy over Cionci's coverage by Lumbermens would, without more, be ended by the declaratory judgment. On the other hand, to require Dutcher's joinder now would, at the least, mean a retrial on the same evidence and with no change in circumstances except the nominal one that he would be a party on the record.[14] To ignore these factors is to eliminate what is the crucial element in the case as it is now before us.

Thus the present declaratory judgment would definitively determine Lumbermens' obligation to pay the judgments against Cionci if no conflict arises with Dutcher's rights; and if the contingency should come to pass in which

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12 The accident occurred on January 17, 1958. It is true that in Shields v. Barrow, supra, the suit was dismissed after 13 years of litigation. This is not, however, a direction that we should be indifferent to the lapse of time. The view of a more leisurely age is not a safe guide in a time of court congestion and the increased recognition of the rights of parties to the prompt determination of their claims, a right as old as Magna Carta.

13 A. L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961); Brillhart v. Excess Insurance Co., 316 U.S. 491 (1942).

14 If Dutcher were aligned as a party defendant with Lumbermens, diversity jurisdiction would be defeated. Of course, this would not excuse the absence of an indispensable party. But "the necessity for relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of this rule would oust them of their jurisdiction. . . ." Payne v. Hook, 74 U.S. (7 Wall.) 425, 431 (1868). See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 407-8 (1964).

Dutcher has an interest which clashes with Cionci's, the declaratory judgment would not affect his rights, nor would it subject Lumbermens to double liability. There is present, therefore, the immediate and substantial prospect of authoritatively settling the controversy between Cionci's judgment creditors and Lumbermens without doing any legal or practical injury to the rights of Dutcher, the absent person. All this is possible as a result of the jury's factual determination that Cionci was driving the automobile with Dutcher's consent at the time of the accident. Preserving this factual finding and making it as fully applicable as it may be in Dutcher's absence as a party would permit us to utilize the declaratory judgment to a substantial extent instead of completely abandoning the result which the judicial process has already yielded.

It seems clear to me, therefore, that under the old Rule 19 the suit should not be dismissed because of Dutcher's absence as a formal party. This is made even more clear by the completely rewritten, new Rule 19. It provides that a person whose joinder will not deprive the court of jurisdiction over the subject matter of the action [15] shall be joined as a party if he claims an interest relative to the subject of the action and the disposition of the action in his absence may "as a practical matter impair or impede his ability to protect that interest. . . ." If such a person cannot be made a party, the court must determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The Rule lists the factors to be considered by the court, among which are the extent to which a judgment will be prejudicial to the absent person or to those who are parties, and "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided."

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15 See supra, n. 14.

The Advisory Committee has emphasized that it rewrote Rule 19 because a number of courts, misled by the unfortunate language of the old Rule, had failed to apply it pragmatically. Again and again, in various terms the Committee has declared that "the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action." The Committee recognized that "an adjudication between the parties who are present before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person." These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they "do not themselves negate the court's power to adjudicate as between the parties who have been joined." The Committee attributed to confusion over the language of the old Rule the mistaken view taken by some courts "that the absence from the lawsuit of a person who was 'indispensable' or 'who ought to be [a] part[y]' itself deprived the court of the power to adjudicate as between the parties already joined." Some courts, the Committee said, were misled by the "jurisdictional fallacy" and made no inquiry how the case might proceed, while others were preoccupied with abstract classifications. The Committee therefore undertook to strengthen the Rule by affirmatively stating the factors which are relevant in deciding whether the action should proceed or be dismissed. These factors, the Committee has wisely noted, are not exclusive. In view of the history of the old Rule it would have been well to have included the substance of this comment in the text of the new Rule.

It is plain from the provisions of the Rule and the comments of its draftsmen that it is within the court's discretion and certainly within its power to permit a case to continue even though a so-called "indispensable" party is not joined. Indeed, the draftsmen explicitly adopt the

view that whether a party is indispensable is the statement of a conclusion rather than a guide to decision.[16]

Rule 19 in effect, therefore, is an effort to restate the liberal view which requires a practical consideration of the circumstances and an effort to shape relief to avoid injustice rather than the automatic dismissal of the action by applying the label of "jurisdictional" defect because an interested person was not made a party. The difference between the old and the new Rule 19 is graphically illustrated in the change in title. It formerly was entitled, "Necessary Joinder of Parties"; it is now entitled, "Joinder of Persons Needed for Just Adjudication". Thus, the Committee has endeavored to emphasize the importance of equitable, discretionary factors.

The new Rule 19 applies to this case, which was pending before us on July 1, 1966, when the amendments went into effect.[17] Indeed it is on this appeal that the question of Dutcher's "indispensability" first arose. Thus, even if the new Rule had altered the prior law, the action should not now be dismissed.

The majority, however, refuses to consider how the jury's verdict may be preserved and dismisses this as irrelevant because the defect is "jurisdictional". The label bottles up all such considerations of practicality and equity. This lack of "jurisdiction" the majority finds from standards for determining indispensability which it declares are "substantive," and so, under the Enabling Act (28 U.S.C. § 2072) cannot be affected by Rule 19. From this no conclusion can be drawn except a condemnation of the new Rule 19 as invalid. It is a consequence which I believe is unjustified and born of the mistaken, abstract conception of

16 The Committee stated: "The subdivision uses the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors above-mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." See also supra, n. 4.

17 See 383 U.S. — (1966). See also John R. Alley & Co., Inc. v. Federal Nat. Bank of Shawnee, 124 F.2d 995 (10 Cir. 1942); Hoffman v. New Jersey Federation, 106 F.2d 204, 207 (3 Cir. 1939).

an artificial distinction between "substantive" and "procedural", which would draw a narrow line to mark the permissible scope of the federal rules, contrary to the teaching of *Hanna v. Plumer*, 380 U.S. 460 (1965).

I believe, therefore, that the circumstances require that the factual finding that Cionci was driving the automobile with the permission of Dutcher should be preserved despite Dutcher's absence as a party, that the law as it existed under the old Rule 19 permitted this, and that the new Rule 19 which is valid and applicable re-emphasizes the desirability of doing so.

II.

The Availability of Declaratory Judgment.

The second ground for dismissal of the action also was not urged by the defendant either in the court below or here on appeal. It may be conceded, whatever its merit, that the trial judge in the exercise of his undoubted discretion might have dismissed the action so that the evidence question would be decided by a state court. But that is not what is before us now. Seven years have gone by since the suit was brought. A jury's verdict has settled the factual dispute. The merits of the decision were reviewed on post-trial motions in the court below and were presented here on appeal. All this, the fruit of adversary litigation, is now cast away, and the justification for it is said to be the discretionary power not to entertain declaratory judgment suits where other, more appropriate relief is available. It seems to me that on the contrary our discretion should be exerted in order to save for the parties and for the judicial process what has already been validly determined, rather than to ignore all this and artificially deal with the case as if it had just been instituted in the court below. The Supreme Court recently has rejected automatic application of its latest decisions to past events. Instead it has weighed the practical effect of their retrospective operation.[18] We

18 Miranda v. Arizona, — U.S. — (1966).

should do no less in considering on review the exercise of discretion, and we should test it not by what we would have done if the matter had come to us in the district court before the trial, but rather as it is before us now.

I have already expressed the view that the ultimate judgment entered in the court below in this case is one which can be made effective and should not now be cast aside because there exists the speculative possibility that Dutcher may come to have an interest which would be effected although it is equally likely at least that this may never come to pass.

I therefore would not dismiss the declaratory judgment action. On the contrary, I would preserve the declaratory judgment decree by directing the court below to amend it by expressly staying any execution by virtue thereof until Dutcher shall have had a full opportunity, either in the court below or in the state courts to present any claims he may have to the protection of Lumbermens' policy as a result of the determination of the now pending state court actions against him.

Since I would not dismiss the action, it is necessary that I discuss the contentions made on the merits, which the majority does not reach.

III.

Dutcher's Competency as a Witness.

1. *The Dead Man's Rule.*

The question which the parties have presented is this: Did the Pennsylvania Dead Man's Rule [19] render Dutcher incompetent as a witness against the estates of Lynch and Smith on the ground that his interest was adverse to that of the decedents?

The trial judge held that Dutcher was incompetent as a witness against the Lynch and Smith estates because the

19 Act of May 23, 1887, P. L. 158, § 5(e), 28 Purdon's Pa. Stat. Annot. § 332.

purpose of their claims is to subject the policy to Cionci's liability, whereas Dutcher has an interest in maintaining it for himself. The court reasoned that since the policy has fixed limits and the aggregate amount of the judgments which may be recovered against Cionci's estate and Dutcher, respectively, is as yet unknown, it is possible that the Lynch and Smith estates' claims against Cionci's estate might reduce the protection available to Dutcher under the policy, and Dutcher therefore had an interest adverse to that of the Lynch and Smith estates which barred him from testifying against them.[20] Although, as I have pointed out, the judgment in this action can have no adverse legal effect on Dutcher, it could have operated in his favor because under Pennsylvania law the estates of Lynch and Smith would have been bound by a judgment adverse to them.[21] Dutcher therefore had an interest that may be characterized in a general sense as adverse to that of the estates in this action. The question is whether his interest was adverse within the meaning of the disqualifying statute.[22]

The seemingly simple language of the Act has been the subject of innumerable decisions and its application in particular circumstances is not always free from doubt. In the present case the effect of a judgment in this action on Dutcher at the time he testified must have appeared contingent at the most. For it is unknown even now whether he will ever be called upon to make any payments beyond the coverage of the insurance policy even if Cionci is also held to be covered by it. There are no Pennsylvania deci-

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20 Cionci's estate made no objection to Dutcher's testimony.

21 See n. 8, supra.

22 Most writers have urged that the dead man's rule be abandoned as a relic of common law disqualification of all interested parties. See 2 Wigmore, Evidence (3d ed. 1940), §§ 575-80; McCormick on Evidence (1954), pp. 142-44; 1 Morgan, Basic Problems of Evidence (1954), pp. 84-5; American Law Institute, Model Code of Evidence (1942); pp. 92-7. For a dissent by an eminent Orphans' Court judge, based on long experience, see Gest, The "Dead Man Statute", Pa. Bar Q., March, 1930, p. 18.

This court, however, has held that the rule of a survivor's incompetency is so thoroughly established in Pennsylvania that despite strong criticism it may not be supplanted by federal decisional rules in a diversity action. Wright v. Wilson, 154 F.2d 616, 620 (1946), cert. denied, 329 U.S. 743 (1946). Cf. Hanna v. Plumer, 380 U.S. 460 (1965).

sions which would flatly decide whether in these circumstances Dutcher was competent to testify against the Lynch and Smith estates. We need not now decide, however, the correctness of the ruling of the court below. For Dutcher testified fully on the same factual issue as to the Harris claim, and now that the issue was decided against Lumbermens and in favor of Harris, Lumbermens may not raise it against the Lynch and Smith estates. As to Lumbermens, therefore, the exclusion of Dutcher's testimony on the claims of the Lynch and Smith estates, even if erroneous, would not justify reversal, because Lumbermens is estopped from raising the issue.

2. *Collateral Estoppel.*

Harris survived the tragedy and the Act of 1887 therefore is inapplicable to him. Dutcher testified fully on behalf of Lumbermens against him. The issue there was identical with that in the claims of the Lynch and Smith estates, which were tried at the same time before the same judge and jury, i.e., did Cionci deviate from the terms of the loan.

It is true that the Lynch and Smith estates were not strictly speaking parties in the Harris claim which the jury adjudicated, and that one who is not a party or in privity with a party to the first action, not being bound by that judgment, ordinarily is forbidden, on the principle of mutuality, from claiming the benefit of it. But the indiscriminate application of the requirement of mutuality was discredited in the pioneer California case of *Bernhard v. Bank of America National Trust and Savings Association*, 19 Cal. 2d 807, 122 P.2d 892 (Cal. 1942).[23] In broad terms Justice Taylor there said: "The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litiga-

23 See Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 172 Atl. 260 (1934).

tion in which the matter was decided. . . . He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. . . . There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation." (122 P.2d, at 894).

The modern rule was applied in *Bruszewski v. United States,* 181 F.2d 419 (3 Cir. 1950), cert. denied, 340 U.S. 865 (1950); and it has been accepted in Pennsylvania.[24] In *Bruszewski* an injured longshoreman's suit against the United States for negligence of the crew and the unseaworthiness of the vessel was held barred by a prior directed verdict and judgment against the same plaintiff in favor of Isthmian Steamship Company, which serviced the vessel under an agreement with the United States, where the grounds for the claimed liability were the same. The basis of the decision was that the plaintiff could not litigate in a second suit, even against a different defendant, the issues which he had litigated and lost in the first suit. Judge Hastie, speaking for the court, said: "This second effort to prove negligence is comprehended by the generally accepted precept that a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. . . .

"The countervailing consideration urged here is lack of mutuality of estoppel. . . . But a finding of negligence in the Isthmian case would not have been binding against the United States because the United States had no opportunity to contest the issue there. . . . Thus, no unfairness results here from estoppel which is not mutual. In reality the argument of appellant is merely that the application of *res judicata,* in this case makes the law asym-

24 Bruszewski was cited favorably by the Pennsylvania Supreme Court in Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 33 (1957), cert. denied, 355 U.S. 832 (1957). See also Posternack v. American Casualty Co. of Reading, 421 Pa. 21, 25-26 (1966); Davis v. McKinnon & Mooney, Inc., 266 F.2d 870 (6 Cir. 1959); Spector v. El Ranco, Inc., 263 F.2d 143 (9 Cir. 1959). Cf. Hurley v. Southern California Edison Co., 183 F.2d 125, 135-36 (9 Cir. 1950).

metrical. But the achievement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata.*" (181 F.2d, at 421). This principle was very recently recognized in *Makariw v. Rinard,* 336 F.2d 333 (3 Cir. 1964), which held res judicata inapplicable against a defendant where the plaintiff had earlier obtained a judgment against the defendant's employer. The court, applying Pennsylvania law, distinguished cases which enforced res judicata, on the ground that "in each, unlike the instant case, the party foreclosed had litigated the critical issue in a prior action." (336 F.2d, at 335).

A penetrating study of the subject (Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine,* 9 Stan. L. Rev. 281 (1957)), has shown that injustice might result from an unlimited application of the doctrine of the *Bernhard* case.[25] It has therefore been suggested that the requirement of mutuality should not be discarded where the party sought to be estopped has not had a full and fair opportunity to litigate the issue effectively because of his former adversary's possession of the initiative.[26] This difficulty was recently considered and the suggested limitation adopted in *Zdanok v. Glidden Company, Durkee Famous Foods Division,* 327 F.2d 944 (2 Cir. 1964), cert. denied, 377 U.S. 934 (1964). Judge Friendly on a review of the circumstances found that the defense in the first suit was diligent and adequate and therefore applied collateral estoppel notwithstanding the absence of mutuality.[27]

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25 For example, a disaster such as a railroad or airplane accident may give rise to numerous suits against the same defendant. On accepted principle, any judgments for the defendant, no matter how numerous, will not bind absent plaintiffs. To give full scope to the language of the Bernhard case in such circumstances would offend against the most common notions of fairness. For no amount of victories by the defendant would conclude the remaining plaintiffs, whereas a single victory by any one of the plaintiffs anywhere along the line would collaterally estop the defendant as to its negligence in all the succeeding cases.

26 Currie, supra, at p. 308. For the railroad or airplane accident cases Currie suggests that mutuality should be required because of the injustice to the defendant faced with many successive suits.

27 To the same effect is Graves v. Associated Transport, Inc., 344 F.2d 894 (4 Cir. 1965). See also United States v. United Airlines, Inc., 216 F.Supp. 709, 725-29 (D.Nev. 1962), affirmed on this point, 335 F.2d 379, 404-5 (9 Cir. 1964), cert. dismissed, 379 U.S. 951 (1964).

It is clear, therefore, that the requirement of mutuality will not be eliminated where the result would be to impose any hardship or unfairness on the party who lost the first suit. In the present case the facts uniquely combine to remove any possible element of unfairness if mutuality is not required. The object of the present proceeding was to overthrow judicially Lumbermens' disclaimer of coverage of Cionci's estate. The primary adversaries therefore were Cionci's estate and Lumbermens, and it was through Cionci's estate, which was a named party, that the plaintiffs, including Harris, claimed. The jury decided on the merits in Harris' claim that Lumbermens' policy covered Cionci's estate. Lumbermens there had full opportunity, of which it availed itself, to present Dutcher's testimony regarding his loan of the car to Cionci. Lumbermens therefore is bound by that determination and may not raise it against the Lynch and Smith estates.

IV.

The Claim of Prejudice by Joinder.

Lumbermens seeks a new trial as to Harris on the ground that it was prejudiced before the jury by the directed verdict in favor of the Lynch and Smith estates. There is no merit in this contention under the circumstances. Lumbermens itself brought about the joinder of Harris and the Smith estate as plaintiffs, and later opposed the efforts of the Lynch estate to obtain a severance of the trial of its cause of action from that of Harris and the Smith estate. Lumbermens opposed the severance on the ground that it would defeat the very purpose for which it had successfully sought the joinder of Harris and the Smith estate. This purpose was to have Cionci's coverage determined in one trial with respect to all the interested plaintiffs and thereby avoid a multiplicity of trials. Having brought Harris and the Smith estate into the proceedings as plaintiffs and resisted the efforts of the Lynch estate to obtain a severance, it is too late for Lumbermens

to urge now, after the verdict has gone against it, that it suffered an injustice which requires a new trial because of its own success in having the three claims tried together.[28]

V.

The Instructions on Deviation.

There is no merit in the contention made in the appellant's brief, but not pressed at the argument or reargument, that there was reversible error in the charge to the jury dealing with the question whether Cionci deviated from the permission granted him by Dutcher.

There were two factual problems presented. One related to the distance and the other to the time which limited the permission granted by Dutcher. Dutcher was the only witness on these matters, since Cionci, and Lynch who accompanied him, were both dead, and Harris, who survived, had not been present when the permission was granted.

Lumbermens presented a point for charge on the distance limitation, which the trial judge did not adopt, because it was covered by the charge.[29] He then dealt with the limitation as to time. He stated his recollection that Dutcher had indicated that they were to return in a half hour, but that other questioning of Dutcher indicated that perhaps a couple of hours might have been involved. He expressly left it to the jury to recall what the evidence on this was and to interpret it in order to determine what permission Dutcher gave to Cionci and whether that per-

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28 Compare Bruszewski v. United States, 181 F.2d 419, 421, n. 2 (3 Cir. 1950), cert. denied, 340 U.S. 865 (1950), where it was noted that Bruszewski had sustained a single injury from a single cause and therefore might have consolidated his claims against the two defendants in one suit rather than have brought separate suits as he did. Judge Hastie said: "While the claimant was not obliged thus to consolidate his suits, no canon of fairness requires that he be given the special advantage of twice trying the same issue where he did not elect to join them."

29 "If Mr. Dutcher gave permission only to go to Ardmore and return, and Cionci drove to Media, I think that we all agree that when you look at the map, that goes beyond what you would call a minor deviation from the permission, because of the distance that is involved."

mission was exceeded.[30] He then stated emphatically that if Dutcher had given a limited permission and it was exceeded, the jury must find for the defendant.[31]

The charge authorized the jury to find in favor of Lumbermens if there was any use of the car beyond the permission granted and made no allowance for minor deviation. The charge therefore was more favorable to Lumbermens than the evidence justified.

It is clear therefore that the charge was free from error prejudicial to Lumbermens, and that even if there were error it would not justify reversal.

In my view therefore the verdict of the jury should be permitted to stand. Since the court dismisses the action, I dissent.

I am authorized to state that Judge Ganey joins in this dissent.

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30 "There is also a possibility that Mr. Dutcher's permission was limited in space, destination and return being Ardmore, as he testified at one point, or possibly it was limited as to time. As I recall, he indicated he provided that they would be back in a half hour. Then there was some other questioning of him which seemed to indicate that perhaps a couple of hours might have been involved. But this is all for you to recall precisely what the testimony was.

"The thing you must consider is whether Mr. Dutcher's testimony is credible and, if you determine that it is credible, you will have to interpret precisely what permission he gave to Cionci to drive this car and whether that permission was exceeded."

31 "If the permission was exceeded, then you must find in favor of the defendant. . . . If you get to the point where you believe that he [Dutcher] gave a limited permission and that the limited permission was exceeded, then you must return a verdict in favor of the defendant."

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court of July 8, 1963 be, and the same is hereby vacated with costs and the cause remanded with directions to dismiss the declaratory judgment action.

Attest: IDA O. CRESKOFF, *Clerk*.

August 30, 1966.

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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~966~~ 28

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMR. of the Estate of JOHN R. LYNCH, A/K/A JOHN ROBERT LYNCH, Deceased,

Petitioner,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, Admx. of the Estate of THOMAS W. SMITH, Deceased

v.

LUMBERMENS MUTUAL CASUALTY COMPANY

and

GEORGE W. PATTERSON, ADMR. of the Estate of DONALD CIONCI, Deceased.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

NORMAN PAUL HARVEY,
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Philadelphia, Pennsylvania,
Attorney for Respondent.

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

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STATEMENT OF THE CASE.

With respect to the petition now before this Honorable Court, the respondent accepts the Statement of the Case as set forth in the petition.

REASONS FOR DENYING THE WRIT.

I. The named insured in the automobile liability policy issued by the respondent was an indispensable party but was not joined in the declaratory judgment action.

This proposition is supported by the decided cases and the reasoning of the Court of Appeals for the Third Circuit in its opinion.

The purpose of this response to the petition for the writ is to consider the points stressed in the minority opinion.

II. The minority view would not do justice to all parties.

It must be considered from the outset that the plaintiff, Provident Tradesmens Bank & Trust Co., Admr. of the Estate of John R. Lynch, Dec'd, chose the forum and that the other plaintiffs, although free to do so, never pursued their actions in the Common Pleas Court of Delaware County, Pennsylvania. The tort claims came into being in Delaware County, all of the dead and injured persons resided in that county and every necessary party was subject to the jurisdiction of the Common Pleas Court of Delaware County. The "complete justice" which concerns the minority could have been achieved in the courts of the Common-

wealth of Pennsylvania. The problem which has consumed so much time of the Court of Appeals would not have existed had the plaintiffs pursued their rights in the state courts. Since the minority seems concerned about the years which have elapsed since the litigation began, it is appropriate to note that all litigation could have been completed between five and six years ago had the actions been brought in Delaware County.

If the plaintiffs felt that it was good tactics to attempt a piecemeal handling of the various aspects of the litigation, the consequent delay is of their making and should not now be placed in the scales to counter-balance the justice due *all parties. Those comments, concerning the length of time* which has passed since the accident, and court congestion (Appendix A, page 34, n. 12), would not seem to add weight to an argument, the purpose of which is to support a judgment determining the rights of parties to property.

In practice, the complicated procedures advocated by the minority would protract litigation in the instant case and would set a precedent which would lead to chaotic conditions for as long as it continued to be the law. This conclusion is supported by the reading of the minority opinion as it relates to suppositions as to what may happen in the tort actions, what further litigation may be required in the state courts, and the admitted possibility that the conclusion reached in the state court may be at variance with the judgment of the federal district court which it would affirm.

So far as the future is concerned, one may easily foresee the multiplicity of litigation if federal courts decide cases on an issue, which decisions do not bind others intimately concerned but not bound by the judgments; and where such persons, as Dutcher in the instant case, are free to seek and obtain judgments completely at variance with the judgments of the federal court.

Some aspects of the foregoing are considered hereinafter

with reference to cases decided by this Honorable Court, cases which are decisive of the principal issue in this case but not mentioned in the minority opinion.

It would not be fair to say that the plaintiffs elected to try this litigation piecemeal in order to obtain a judgment against Lumbermens which, of course, would not bind Dutcher, and thus seek to enlarge the coverage. The statement of the minority (Appendix A, page 31, n. 7) to the effect that the limits of the policy are not increased by the inclusion of more than one insured is no answer to the possible enlargement because a state court may find Dutcher liable to the plaintiffs in the pending tort actions and, since Lumbermens does not deny that Dutcher is entitled to coverage, and never has taken such position, it would be required to pay judgments against him up to the policy limits. In appropriate proceedings, the state Court might decide that Cionci was not using the automobile in accordance with the permission granted him by Dutcher. Therefore, no inclusion of more than one insured would exist under state law. At the same time the federal court judgment would bind Lumbermens, if the minority opinion prevailed, and Provident has a judgment of $50,000 against Cionci's estate under an arrangement entered into for settlement in that amount by the administrator of the penniless Cionci estate.

In considering the foregoing it must be remembered that Dutcher may be liable to the plaintiffs in tort without any showing that Cionci was his agent, that he had control of Cionci or that Cionci was driving within the scope of the permission granted. It is possible that Dutcher might be held liable on the ground that he should not have entrusted the vehicle to Cionci or to Lynch; it might be shown that he bailed a defective vehicle. Therefore, a finding of liability would not be inconsistent with a finding that no coverage existed for Cionci.

In the light of the foregoing, what justification has the minority for saying that the federal court could do complete justice in the absence of Dutcher? It is readily seen that Dutcher and the Lumbermens have been placed in ambiguous positions. There is no adversity between these parties and such can only exist if the minority opinion were the law.

If Dutcher is held liable to the plaintiffs in the tort actions in the state Court, and the minority is correct in stating that the policy limits are fixed; and if its construction of the phrase in the policy which states "inclusion herein of more than one insured shall not operate to increase the limits of the company's liability" is sound, Dutcher will be forced to share the fund, which he has produced by purchasing the policy, with a person who violated the limitations placed on his use of the vehicle. His unfortunate predicament will result from a judgment in an action to which he was not a party and, obviously, not represented by counsel. Such result cannot be said to be in accord with any reasonable concept of justice.

III. The minority view would substantially protract this litigation and lead to multiplicity of suits in the future.

In the view of the minority, indispensability depends, inter alia, upon practical considerations. After speaking of complete justice to all concerned, the minority gets to the point of recognizing that there is a real possibility that Dutcher may be injured by conflicting claims to protection under the policy (Appendix A, page 31). Certainly this will be the situation if judgments in excess of $50,000 are obtained by the other plaintiffs. One is a death case and the other a serious bodily injury claim. As was stated in the Supplemental Brief filed on behalf of Lumbermens in the

Court of Appeals (page 2), the judgment agreed to between Provident and Cionci's estate constitutes one-half of the total coverage. The minority, with no knowledge of the worth of the open cases, proposes to guess as to whether or not the total of all judgments will exceed the policy, saying there will be no conflict if the judgments do not exceed the coverage, and, then, saying that perhaps they might exceed the coverage, envisions litigation involving the Cionci estate, Dutcher and Lumbermens to determine Dutcher's "claim to superiority over Cionci's estate to indemnity from the fund created by the policy" (Appendix A, page 31). It is said that Dutcher can then litigate the question whether Cionci was driving with his (Dutcher's) permission at the time of the accident. In other words, relitigate the very question which the minority says was settled between the Cionci estate and Lumbermens in the court below. Under the policy there is no "superior right" to coverage. A person is an insured or he is not an insured. If Dutcher wins the coverage action against the Cionci estate in the state court, then the very situation which lower courts were directed to avoid in *Maryland Casualty Company v. Pacific Coal and Oil Co., et al.,* 312 U. S. 270, 274, 61 Supreme Ct. Rep. 510 (1941) will exist. This case was cited in both briefs filed on behalf of the Lumbermens in the Court of Appeals. The opinion states the rule that a federal court should not entertain a case where its decree cannot bind a party who is free to go into a state court where he may obtain a judgment directly opposite to that obtained in the federal Court. The *Maryland Casualty Company* case, supra, follows the reasoning of *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 241 (1937) which is referred to by the majority opinion (Appendix A, page 27, n. 16). Neither case is discussed in the minority opinion.

It is clear that the minority is seeking to tailor an opinion to this particular case. The grounds are that its view will

insure complete justice to all parties and that the view is supported by practical considerations.

With due regard for the philosophy of the author, it is respectfully submitted that the minority view would not only fail to achieve those ends but would create unlimited confusion. Hundreds of declaratory judgment actions are brought in federal courts every year. If they can be decided without a party who can later litigate the same factual question in a state court, it is not difficult to foresee the confusion that will be created. But the evils will not be limited to confusion. Delay, also, will be one of the major consequences. If the suggestion of the minority is followed, the prevailing party will be required to mark time until the other tribunal involved has entered a final judgment. That is what is proposed in the instant case. And who shall determine the ultimate end if a federal court and a state court reach diametrically opposite conclusions.

The only answer is rule by law and not by a philosophical approach designed to achieve a result in a particular case.

IV. Authorities cited in minority opinion.

The federal district court cases cited in the minority opinion (Appendix A, page 31, n. 6) have been reviewed and none of them is pertinent to the issues in the instant case. They involve coverage problems which could be solved without reference to the rights of persons not joined. None of the cases indicates that rights of persons not joined were of paramount importance as are the rights of Dutcher in the instant case.

The statement, repeated in various parts of the minority opinion, that Lumbermens will not be subject to double liability, would seem to be inaccurate, as hereinbefore discussed, and no authority is cited for that conclusion by the minority.

It is suggested that analogizing Dutcher and the Cionci estate to joint tortfeasors (Appendix A, pages 32 and 33) is not justified. There is nothing in the record to suggest joint tortfeasorship and the conclusion drawn from the comparison has no validity. The relationship is that of indemnitor and indemnitee as stated by the minority (Appendix A, pages 31-32, n. 8). Therefore, the case cited by the minority, *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 330 (1955) has no bearing and is no authority for whatever proposition it is supposed to support.

It is said in the minority opinion (Appendix A, page 29) that from the earliest times courts have been guided in determining indispensability by practical considerations. Reference is made to *Shaughnessy v. Pedreiro*, 349 U. S. 48, 54 (1955), wherein a suit against a subordinate official, without joinder of the superior, was sustained. However, in *Johnson v. Kirkland*, 290 F. 2d 440 (1961), cert. denied 368 U. S. 889, it was held that the failure to join the superior was fatal. The cure was not to distort the concept of indispensable party but to place the matter before Congress which passed the Act of October 5, 1962, Pub. L. 87-748, sec. 2, 76 Stat. 744, 28 U. S. C. sec. 1391 (e). As judicial legislation was not the answer to the problem dealt with there, so judicial legislation is not indicated in the instant case. Since no act of Congress can create a right to decide cases in the absence of an indispensable party the solution is for parties to bring actions in a jurisdiction where *all* persons with an interest, such as Dutcher in this case, may be bound by the judgment entered.

CONCLUSION.

While the minority opinion speaks of finality of the decree, justice to all parties and practical considerations, it is found upon examination of the opinion that it does not envision formality, except in a most restricted sense; that justice to all parties is not achieved, not even to plaintiffs, and that protracted litigation is inevitable if the minority's views are followed.

Respectfully submitted,

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Attorney for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 28.

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Admr. of the Estate of JOHN R. LYNCH, a/k/a JOHN ROBERT LYNCH, Deceased,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, Admx. of the Estate of THOMAS W. SMITH, Deceased

Petitioner,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY

and

GEORGE W. PATTERSON, Admr. of the Estate of DONALD CIONCI, Deceased.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 28.

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMR. OF THE ESTATE OF JOHN R. LYNCH, a/k/a JOHN ROBERT LYNCH, DECEASED,
Petitioner,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, ADMX. OF THE ESTATE OF THOMAS W. SMITH, DECEASED,

v.

LUMBERMANS MUTUAL CASUALTY COMPANY

and

GEORGE W. PATTERSON, ADMR. OF THE ESTATE OF DONALD CIONCI, DECEASED,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 218 F. Supp. 802 (R. 186). The opinion of the Court of Appeals for the Third Circuit is reported at 365 F. 2d 802 (R. 223).

JURISDICTION.

The Decree of the United States Court of Appeals for the Third Circuit was entered on August 30, 1966 (R. 271). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. When an automobile owned by the named insured in an automobile liability insurance policy is lent to an operator, who is killed in a car collision causing additional deaths and serious injury and the insurer refused coverage to operator's estate as defendant in multi-party suits, both in state and federal courts, in which the insurer was not a party and the issues different, was not a declaratory judgment action against the insurer to determine coverage under the permissive use clause, in which all the victims were joined as plaintiffs, within the sound discretion of the trial judge?

2. Under the above circumstances, where the named insured is one of the defendants in the state court actions grounded on tenuous vicarious liability, did not the appellate court err in finding the named insured an indispensable party and dismissing the action under Rule 12(b) and refusing the pragmatic application of Federal Rules of Civil Procedure Rule 19, prior to and subsequent to its amendment, as beyond the rulemaking power of this Court?

STATUTES AND RULES INVOLVED.

The statutory provisions and rules involved are: Federal Declaratory Judgment Act, Act of June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349, 28 U. S. C. 2201 and Federal Rules of Civil Procedure 19. They are set forth in Appendix C hereto.

STATEMENT OF THE CASE.

This cause of action arose out of an accident which occurred on January 17, 1958, in which an automobile owned by Edward S. Dutcher was being operated by Donald C. Cionci and in which John R. Lynch and John L. Harris were passengers.

The automobile operated by Cionci, travelling at high speed, crossed the median strip and struck a vehicle being operated by Thomas W. Smith. As a result of the accident, John R. Lynch, Thomas W. Smith and Donald C. Cionci were killed. John L. Harris was severely injured (R. 65, R. 68).

A damage action was brought in the United States District Court by Provident Tradesmens Bank and Trust Company as administrator of the estate of John R. Lynch, deceased, against George W. Patterson as administrator of the estate of Donald C. Cioni, deceased, and entitled Civil Action No. 25149 (R. 11). The estate of Donald Cionci was insolvent and a copy of the complaint was forwarded to Lumbermens Mutual Casualty Company (sometimes called the insurer), who had issued a policy of automobile liability insurance to Edward S. Dutcher (sometimes called the named insured), as owner of the aforementioned vehicle (R. 18-19). Upon Lumbermens' refusal to defend, a default judgment was subsequently entered and the matter was listed for assessment of damages.

Thereafter, the instant case was brought as a civil action calling for a declaratory judgment by Provident Tradesmens Bank and Trust Company as administrator of the estate of John R. Lynch, deceased for the purpose of determining whether or not Cionci was an assured under the permissive use clause of the insurance policy issued to Dutcher by Lumbermens Mutual Casualty Company (R. 25).

On November 29, 1960, upon motions of Lumbermens Mutual Casualty Company, the court entered an order

joining John L. Harris and the administratrix of the estate of Thomas W. Smith as party plaintiffs (R. 26). No request was made to join the owner Dutcher as either a party plaintiff or a party defendant to the declaratory judgment action.

There was at that time pending in the Court of Common Pleas of Delaware County, Pennsylvania, an action brought by Sarah B. Smith, as administratrix of the estate of Thomas W. Smith against Edward S. Dutcher, the estate of John R. Lynch [1] and the estate of Donald C. Cionci. Similarly, an action was brought by John L. Harris in the Court of Common Pleas in Delaware County against the same three defendants (R. 35).

Prior to the trial of the instant case, the administrator of the Cionci estate, after notice to Lumbermens Mutual Casualty Company, settled the claim of Provident Tradesmens Bank and Trust Company for Fifty Thousand Dollars ($50,000.00) and forwarded a judgment note in that amount. This settlement, after notice to Lumbermens Mutual Casualty Company and their attendance, and argument therein, was approved by the Court, Van Dusen, J., on November 20, 1962 (R. 218-219).

The declaratory judgment action was tried before the Honorable Alfred L. Luongo on December 13, 1962. During the trial, the Court heard extended argument as to the competency of Dutcher, the only surviving witness to the transaction in which the keys of the car were given to Cionci. During this argument, counsel for Provident Tradesmens Bank and Trust Company argued that the contingent interest of Dutcher in the Delaware County suits rendered him incompetent to testify under the Penn-

1. While the actions were brought against the estate of John R. Lynch, the party therein is not the same party as that of the plaintiff in the instant case, inasmuch as the administrator of the estate of John R. Lynch in that case being the nominee of the plaintiff was Wilbert M. Massey. Under Pennsylvania law the identity of the party is determined by the personal representative.

sylvania Deadman's Statute[2] as to the estates of the decedents, but competent to testify as to Harris (R. 112, R. 113). Counsel for Lumbermens Mutual Casualty Company argued that the interest of Dutcher was so remote that the Pennsylvania Deadman's Statute should not apply (R. 112). The court upheld Dutcher's incompetency to testify under Pennsylvania Deadman's Statute as to the estates of the decedents. Dutcher's testimony in the trial as to Harris indicated that the keys to the car had been given to Cionci with geographical limitations, which would have been exceeded if Dutcher's testimony were credible (R. 148). Inasmuch as the other parties to the transaction were dead, no additional light could be shed upon the transaction.

Dutcher's demeanor and testimony was found not credible by the jury who rendered a verdict that Cionci was driving Dutcher's vehicle within the orbit of consent given to Cionci by Dutcher (R. 180). Directed verdicts on behalf of the estates of the decedents were similarly entered (R. 163-164).

At no time during the trial did Lumbermens Mutual Casualty Company raise the issue that Dutcher was an indispensable party. Timely motions were filed by Lumbermens for judgment n.o.v. and new trial, which after argument, were denied (R. 197).

The Court entered an order that Donald Cionci was the operator of Dutcher's motor vehicle at the time of the accident and was an assured under the permissive use clause of Dutcher's insurance policy (R. 198). The Court refused a form of judgment that would have required immediate execution of the judgment of Lumbermens Mutual Casualty Company against the estate of Cionci (R. 199). Appeal was taken from such refusal by Lumbermens Mutual Casualty Company, but this appeal was ultimately abandoned. The matter was first argued before a panel

2. Act of May 23, 1887, P. L. 158, § 5(e), 28 Purdon's Pa. Stat. Annot. § 332.

of the Court of Appeals for the Third Circuit on October 6, 1964, without decision. After eighteen months it was ordered for reargument on June 9, 1966 (R. 221).

The majority of the Court found that Dutcher was an indispensable party and therefore the trial court was without jurisdiction. They also found that the trial court abused its discretion in entertaining the declaratory judgment action. It found further that the concept of indispensable party was substantive in nature and insulated from the rulemaking power of this court. It rejected the proposed clarification of the Rule 19 in the light of the advisory committee's note accompanying that rule.

The minority of the court in its dissent believed that the action should not have been dismissed under either former Rule 19 or amended Rule 19 and that the entertainment of the declaratory judgment action was within the sound discretion of the court. It denied that the concept was one of substantive law and strongly defended the power of this court to set forth pragmatic criteria for the guidance of the lower courts.

ARGUMENT.

The issues in the instant case are relatively narrow despite the tangled factual skein. A threshold decision as to the discretion of the lower court to entertain a declaratory judgment action is properly made, where there was a common thread of a factual issue to be determined, namely, whether the deceased operator of an automobile was operating a borrowed vehicle within the geographical scope of the owner's permission.[3] Under Pennsylvania law, there is a presumption that an operator of a vehicle is operating the vehicle with the owner's permission unless rebutted by credible evidence.[4] The estate of the operator of the vehicle whose tortious driving resulted in several deaths and a serious injury was insolvent and the resolution of the dispute as to permission was necessary to elevate the various damage actions pending in Federal and State Courts above mere academic exercises.

The District Court was correct in entertaining the instant action under the Federal Declaratory Judgment Act as there was no other forum that could expeditiously and in a single action resolve this issue. The Declaratory Judgment action while brought by Petitioner, Provident Tradesmens Bank and Trust Company as administrator of the estate of Lynch was acquiesced in by the insurer and the other plaintiffs in various damage actions when joined at the behest of the insurer. The declaratory judgment action provided the economy of a single trial and avoided the spectre of inconsistent results.

Equity was the midwife of the concept of indispensable party, arising out of the passion of equity courts to do complete justice to all possible parties related to

3. There was a second issue as to who was operating the vehicle at the time of the accident. At the trial of the cause, however, the defendant insurer did not seriously dispute that Cionci was the operator.

4. *Exner v. Jafeco Ins. Co. of America*, 402 Pa. 473 (1961).

the controversy. *Gauss v. Kirk,* 198 F. 2d 83, 85, n. 2 (C. A. D. C. 1952); Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 347 (1957); Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Columbia L. Rev. 1254, et seq. (1961).

Though the concept was born of equity restraint, its transmigration into the law side provided the opportunity to some courts to endow it with a technical rigidity and a formula for jurisdictional ouster. Some courts began to speak of the failure to join an indispensable party as a jurisdictional defect or a denial of due process to the absent party. It became apparent that frequently the concept of indispensable party was utilized as a label to denote conclusions reached after weighing undisclosed equitable considerations. Wright, Federal Courts § 70 at 263 (1966 Ed.).

The Advisory Committee on Federal Rules of Civil Procedure dedicated itself to the task of reaffirming through a newly fashioned Rule 19 the procedural aspects of the concept; determining when it is feasible to join parties and setting forth clarifying standards for the lower courts for proceeding when joinder is not otherwise feasible. 39 F. R. D. 88 et seq.

The absence of the owner of the automobile did not preclude a judgment consistent with equity as between parties to the instant action. The record indicates that the interest of the named insured was contingent and highly remote. The cause of action against named insured was grounded in agency, whereas the evidence in its best light can sustain permissive use only. The cause of action against Dutcher, the named insured, has lain dormant in the state court for eight years.[5] Though the defense of Dutcher in that action is provided and directed by the defendant Lumbermens Mutual Casualty Company (R. 35, 36), no effort has been made to resolve the liability against

5. The pleadings in the Delaware County cases are included herein as an appendix to the brief.

Dutcher either by preliminary motions or a trial of the cause.

The owner of the vehicle, the named insured, not being a party to this action, his interest in the finite limits of the policy cannot be affected and he would stand to benefit by an active participation of the insurer in a defense on the merits as to the estate of the operator. Even though the majority of the Appellate Court regarded the owner as a person needed for a just adjudication, protective provisions in the judgment and the shaping of the relief afforded, could have been utilized in lieu of the dismissal of the action. In determining whether the owner of the vehicle is a person needed for just adjudication, it should be taken into consideration that the owner was afforded full opportunity to testify in the instant action and his testimony was rejected by the jury and by the court as not credible (R. 192, 193).

The implanting of a substantive label on the indispensable party concept and the creation of a substantive right where none existed before by the majority and the cloud that it casts upon the rulemaking power of this court marks a step backward in the design of the Federal Rules of Civil Procedure to provide for the "just, speedy and inexpensive determination of every action."

The Erroneous Labeling of the Indispensable Party Concept as a Substantive Right Improperly Attempts to Frustrate the Rulemaking Power of the Supreme Court to Establish Pragmatic Guidelines for Joinder of Parties for Just Adjudication.

The history of the murky rule of the indispensable party concept while said to stem from the landmark case of *Shields v. Barrow*,[6] has been shown by Professor Reed[7]

6. 17 How. (58 U. S.) 130, 15 L. Ed. 158.

7. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957).

to have had ample predecessors. These cases,[8] as in *Shields v. Barrow* were results of courts of equity expounding equity principles and evolved out of the judicial restraint normally shown by an equity court lacking the parties necessary to render effective justice. It was the thrust of the article by Professor Reed to expose the historical fallacy and delineate the problems which had flowed from the rigid and talisman approach that some courts had indulged in. The article emphasized the superior approach of the third circuit in *Kroese v. General Steel Castings Corporation,* 179 F. 2d 760 (3rd Cir., 1950), cert. den., 339 U. S. 983 (1950). In that case, Judge Goodrich was confronted with a factual circumstance in which Kroese, a New York resident, sued in the United States District Court in Pennsylvania to compel the payment of accumulated dividends on stock which he held in the defendant corporation, incorporated in Delaware but with its principal office in Pennsylvania. There were only three out of 12 directors susceptible to service in Pennsylvania. There was no one state or federal district in which a majority resided and no one would appear voluntarily to confer jurisdiction or venue. Without in personam jurisdiction over the directors, the district court held that it could not order the directors to pay the dividends.

The Court of Appeals reversed and fashioned a decree by which dividends were to be paid out from the sequestered assets of the defendant corporation and the court wisely pointed out that in personam jurisdiction was not needed where the discretion of the directors was no longer involved but that the dividends must be degorged as a matter of law.

There were further rebellions from a rigid and inflexible application of the indispensable party rule. An article written by Professor Hazard[9] further assailed the

8. *Russell v. Clarke's Executors,* 7 Cranch (11 U. S.) 69 (1812); *Mallow v. Hinde,* 12 Wheat. (25 U. S.) 193 (1827).

9. Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Columbia L. Rev. 1254 (1961).

indispensable party concept as a source of confusion and injustice, especially where it was held to have jurisdictional effect. Professor Hazard in conclusion deplored the tendency of some of the courts to apply the indispensable party rule without questioning its illogic and with indifference to the procedural consequences that flowed from its application. See *Fouke v. Scheneweek*, 197 F. 2d 234 (5th Cir., 1952). It is this mechanical application and seeming indifference to the result caused thereby that aroused the dissent in the instant case.

Judge Freedman deplored the mechanical application by the majority of the indispensable party rule:

> "From the earliest times courts have been guided in determining indispensability by practical considerations. The decision whether a person is indispensable therefore depends upon a consideration of all the elements which bear on the justice of requiring joinder in the circumstances of the particular case, or to speak in more familiar terms, upon equitable principles. The label 'indispensable party' therefore has always been in truth more a statement of result than of cause, since the elements which are decisive of indispensability are also those which go to determine whether the suit should proceed in the absence of the interested person." (Footnotes omitted.)

As the dissent pointed out, the interest of justice called strongly for the preservation of the jury verdict. The insurer, Lumbermens Mutual Casualty Company at no time ever raised the issue of Dutcher, the named insured and the owner of the vehicle, as an indispensable party.

The appellate court nevertheless made no inquiry as to the contingency or the remoteness of the interest of Dutcher, except to rely upon the facts upon which Dutcher was barred from testifying under the Pennsylvania Deadman's Rule. However, the Pennsylvania Deadman's Rule is a subjective standard in which contingency and remote-

ness have not the same limiting factor as in the concept of indispensable party.[10] Inasmuch as the insurer had resisted a disclosure of the limits of Dutcher's policy, it was necessary throughout the proceedings to deal with an abstract concept in order to express terms of interest. It is for this reason that the court below and the appellate court speak of finite limits. However, the insurer, Lumbermens, now discloses in its brief that Dutcher's policy has $100,000.00 limits.

The Appellate court ignored the testimony of the witnesses at the trial. Dutcher was the only survivor of the transaction in which his automobile was turned over to Cionci and Lynch. His testimony indicated, at best, limited permissive use. It is highly doubtful plaintiffs in the Delaware County cases in which Dutcher was a party could carry their burden of proof as to agency. The burden and elements of proof as to agency and coverage under permissive use clause are much different. In the latter case, there is a presumption that an operator of an automobile is driving with the owner's permission. Under Pennsylvania law, the presumption can only be dispelled by credible evidence and the issue of what is credible evidence must be submitted to the jury.[11]

Thus, it was possible in the instant case by establishing the lack of credibility on the part of Dutcher to permit the presumption to prevail. Similarly, as to the damage suits of the estates of the decedents in which Dutcher was incompetent to testify, the presumption similarly prevailed.

As to agency, however, it would be necessary for the parties so claiming to furnish affirmative credible evidence. This we submit by the record is not possible.

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10. See *Wright v. Wilson,* 154 F. 2d 616 (3rd Cir. 1946), for a history of the evolvement of the Pennsylvania Deadman's Statute.

Compare *Alcorne v. Cooke,* 101 Pa. 216 (1882) for the degree of remoteness which would render a witness incompetent to testify under the Deadman's Statute.

11. *Exner v. Jafeco Ins. Co. of America,* 402 Pa. 473 (1961).

It is significant in this regard that insurer Lumbermens in eight years has done nothing to resolve the liability of Dutcher either by preliminary motions or by ordering the case on to the trial list. It is further significant that the defense for Dutcher in those actions was provided and directed by the insurer Lumbermens. At any time during these eight years it was within the power of the insurer Lumbermens to dispel any trace or phantom of interest on the part of Dutcher, yet, it did not move to do so.

As Judge Freedman pointed out for the minority, Dutcher has not suffered by the instant action:

> "Dutcher not only will suffer no harm by his absence from the present action; he can gain nothing by being joined. Indeed Dutcher would probably consider adverse to his interest a requirement that he join. For he refrained from intervening under Rule 24 and thus is not bound by the judgment adverse to Lumbermens, even though he would have benefited had the judgment been in its favor. *Makariw v. Rinard, supra.*" (R. 820)

The dissent did not point out a further advantage to Dutcher. Had it been found that Cionci was not operating the vehicle under the permissive use clause, then a fortiorari, there could be no claim for damages against Dutcher in the Delaware County cases on the basis of agency, inasmuch as an adverse decision on permissive use requiring a lesser burden must preclude an action grounded upon agency.[12]

Should this action fail, it could require at least five more trials to resolve the issue which the jury herein has already resolved.[13] The preservation of the jury verdict

12. *American Auto Ins. Co. v. Fulcher* (4th Cir.), 201 F. 2d 751.

13. Separate suits might be required as in *Exner v. Jafeco Ins. Co. of America*, 402 Pa. 473 (1961). These suits could not be brought until judgments had first been secured against the Estate of Cionci.

in the instant case would undoubtedly effectively terminate all litigation. Applying practical principles the estate of Cionci is insolvent except for the insurance coverage sought in the instant case, considering the paucity of evidence against Dutcher, as a defendant, a tender of the policy limits must close this longstanding litigation.

The action of the majority of the Court of Appeals in dismissing this action was an expression of the rigid approach which the advisory committee to the Supreme Court on the Federal Rules of Civil Procedure had sought to avoid by evolving the amended Rule 19. The advisory committee in an unusually detailed explanation in its note catalogued the difficulties that the rule sought to rectify. The note showed the influence of the seminal work of Reed [14] and Hazard.[15] The need for laying to rest the so-called jurisdictional aspect of the indispensable party concept and to reiterate the pragmatic considerations by which a court could proceed notwithstanding the absence of a party were all demonstrated. The factors stressed in the note reveal the pertinent application of these factors to the instant case. In discussing the first factor, the note said:

> "The *first factor* brings in a consideration of what a judgment in the action would mean to the absentee. Would the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor? The possible collateral consequences of the judgment upon the parties already joined are also to be appraised. Would any party be exposed to a fresh action by the absentee, and if so, how serious is the threat?" (citations omitted) 39 F. R. D. 92.

In applying this to the instant case, no review was made as to whether the absent party would be affected in

14. Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957).

15. Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Columbia L. Rev. 1254 (1961).

a practical sense. Instead the appellate court rendered its decision upon a highly technical interest, if any. In addition, the possible collateral consequence of the judgment upon the insurer Lumbermens was as minimal as the gravamen of the action against Dutcher. Even assuming arguendo that there was such a threat to the insurer, Lumbermens, would they not lack consideration based upon equitable principles where they had not raised the issue of indispensable party, and where for eight years they have done nothing to resolve the interest of Dutcher?

The second pragmatic factor evolved by the advisory committee requires examination of the issues by which the prejudice if any may be averted or lessened by the so-called shaping of relief. This, in effect, was done by the trial court in the instant case when it deferred immediate payment of monies out of the fund until the resolution of the Delaware County cases. Thus, the shaping of relief not only decided a common crucial issue, but preserved the fund available until it could be expended following the determination of the various liabilities and damages.

Inasmuch as it was first revealed in Lumbermen's brief that the policy limits were $100,000.00, the Court could have given the various claimants an opportunity to restrict their demands to that amount. This procedure was followed in *Lumbermens Mutual Casualty Co. v. Elbert,* 348 U. S. 48, 52, 99 L. Ed. 59, 64. Had such opportunity been afforded or reafforded, this writer is authorized to state that the attorney representing the claimants other than the petitioner herein will restrict his claims to the unexpended portion of the policy limit, namely, $50,000.00. A decree so framed insulates Dutcher from any possible harm.

The third factor advanced by the advisory committee is whether an adequate judgment can be rendered in the absence of a given person. It is submitted that in the instant case, an adequate judgment was entered. It is submitted that the issue as to whether Cionci was operating

the automobile within the orbit of the permissive use clause was resolved. This factor which could not have been previously litigated was resolved in time so that the insurer Lumbermens could benefit by the finding and move to limit its liability by effectively contesting the damages in the remaining damage claims.

The fourth factor advanced by the advisory committee looks to the practical effect of a dismissal. The minority opinion points out that years of litigation in the federal courts would lapse into a futility (R. 258), whereas instead separate diverse suits would be required in the state court with possible inconsistent results. The majority opinion however sweeps all these pragmatic applications down the drain with a finding not supported in case law by finding that the indispensable party doctrine is not procedural but a declaration of substantive law, according a substantive right to a person to be joined as a party to an action when his interest or rights may be affected by its outcome (R. 228). No authority is given for this declaration of a substantive right, nor is any limitation placed upon the extent of the interest or right that may be affected by its outcome. Remoteness, contingency, major, minor, and scintilla are all swept up in the same general basket.[16] The consequence of this attempt by the majority to stamp a substantive label on the concept of indispensable party has a chilling effect on the purpose of new Rule 19 as pointed out by the dissent:

> "The majority, however, refuses to consider how the jury's verdict may be preserved and dismisses this as irrelevant because the defect is 'jurisdictional'. The

16. Though the court cites a footnote in *Stevens v. Loomis*, 334 F. 2d 775, 778, n. 7 (1st Cir., 1964), an examination of the footnote however indicates that Judge Aldrich has clearly misread the reason for the advisory committee's change in phrasing of Rule 19. The rewriting of Rule 19 was certainly not an admission by the advisory committee that the indispensable party concept is a matter of substantive law. See critical comment on Judge Aldrich's observation in *Kuchenig v. Calif. Co.*, 350 F. 2d 551, 556, n. 18 (5th Cir., 1955).

label bottles up all such considerations of practicality and equity. This lack of 'jurisdiction' the majority finds from standards for determining indispensability which it declares are 'substantive,' and so, under the Enabling Act (28 U. S. C. § 2072) cannot be affected by Rule 19. From this no conclusion can be drawn except a condemnation of the new Rule 19 as invalid. It is a consequence which I believe is unjustified and born of the mistaken, abstract conception of an artificial distinction between 'substantive' and 'procedural,' which would draw a narrow line to mark the permissible scope of the federal rules, contrary to the teaching of *Hanna v. Plumer,* 380 U. S. 460 (1965)." (R. 260, 261)

Norton v. United Gas Corp., 1 FRD 155, 162 (W. D. La. 1940) was a declaratory judgment action seeking a declaration and decree as to the rights and obligations of the parties respecting certain agreements and contracts. The issue of indispensable party was raised. The court found that the interest of the other possible plaintiffs was remote and contingent and fashioned a decree.

Again in *Texas v. City of New Orleans,* 159 F. 2d 77 (5th Cir., 1947), which was also a declaratory judgment action construing a contract, the court refused to recognize as indispensable parties those whose interest was remotely contingent.

In *Gauss v. Kirk,* 198 F. 2d 83 (D. C. 1952), an action was brought for a recovery of a deposit made with an agent towards the purchase of real estate. The vendor was deemed conditionally necessary, but not an indispensable party and the proceedings were permitted to continue without him. It is much like the instant case inasmuch as the court found that the vendor would not be bound by the instant action. Nevertheless, the court made inquiry as to the pragmatic considerations involved. The important considerations being that no judgment was sought which would

reach the funds or property of the vendor independent of the deposit itself. The circumstances of the case required the defendant broker to assert any meritorious defense. The judgment would not be res judicata as to the vendor. The court stressed the fact that the agent had made no effort to avoid the risk of double liability by seeking to interplead the parties or by depositing the fund with the court. Applying these pragmatic considerations it was held that the vendor did not fall within the indispensable party category. The court stressed the uncertain effect on the vendor of an adjudication between the parties. The frustration of the present suit was also considered. The conclusion was under all the circumstances that the litigation should go forward and that the vendor was not an indispensable party.

As was pointed out by the majority opinion, the *State of Washington v. United States*, 87 F. 2d 421 (9th Cir. 1936) is oft quoted as to its criteria in testing whether that party is indispensable. To the extent that it is designed to act as a mechanical jurisdictional guillotine or a quadruple stumbling block, it is contra to the more enlightened proposals. Indispensability is best determined by pragmatic considerations of the individual circumstances of a controversy. Certainly to the extent that the four-fold criteria sheds light on the areas inviting critical examination by the court it has some validity.

In *Benger Laboratories Limited v. R. K. Laros Company*, 24 F. R. D. 450 (E. D. Pa. 1959), Judge Van Dusen rejected an automatic approach to the indispensable party concepts even as to a patent assignee. The court refused to apply Rule of Civil Procedure 12(h) where a party with the necessary information to make a motion for the joinder of indispensable party did not do so and the only effect of the motion under the circumstances would be to protect that party and not the person alleged to be indispensable. In the opinion of the Court, such an interpretation violates the direction of Rule of Civil Procedure No. 1 that the rules

shall be construed to secure the just, speedy and inexpensive determination of every action. The analogy of that case to the instant case where the insurer, Lumbermen's effectively shielded the policy limits from discovery and has permitted the suits in Delaware County where the named insured is a defendant to remain dormant when the extent of the interest of the named assured could have long been resolved is compelling. In addition, the only beneficiary from the dismissal of the action is the insurer, Lumbermens. It gets an undeserved and unmerited second chance to litigate the scope of permission. Certainly the plaintiffs did not benefit by it for they have risked their all and a decision against them would not have only foreclosed insurance coverage but would have foreclosed any recovery whatsoever in the Delaware County suits. Dutcher does not benefit because he may now be forced to run the gauntlet of five separate court actions, which require his presence in court.[17] Consider *Parker Rust-Proof Co. v. Western Union Telegraph Co.*, 105 F. 2d 976, 2 Cir. 1939.

From the earliest times courts have been guided in determining indispensability by practical considerations. The decision whether a person is indispensable therefore depends upon a consideration of all the elements which bear on the justice of requiring joinder in the circumstances of the particular case, or to speak in more familiar terms, upon equitable principles. The label "indispensable party" therefore has always been in truth more a statement of result than of cause, since the elements which are decisive of indispensability are also those which go to determine whether the suit should proceed in the absence of the interested person.

17. That this is not a looked-for experience on behalf of Dutcher is revealed in the colloquy of counsel at p. 77.

The Declaratory Judgment Action Brought by the Estate of a Deceased Passenger to Determine Whether the Insolvent Estate of the Deceased Operator Is Insured Within the Terms of an Automobile Liability Policy, Absent Objections From Other Claimants or the Insurer, Is Within the Sound Discretion of the Trial Court.

The remedy of declaratory judgment in the Federal Court System is statutory.[18] It differs sharply from the Uniform Declaratory Judgment Act in that it does not contain the language of that act which relates to parties:

> "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . ."[19]

In addition, the Federal Act is explicit that an action for declaratory judgment will lie, notwithstanding the applicability of other remedies. This was reiterated in F. R. C. P. No. 57. The original committee note recognizes this important distinction:

> "The fact that a declaratory judgment may be granted 'whether or not further relief is or could be prayed' indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will 'terminate the controversy' giving rise to the proceeding. . . ."
>
> "When declaratory relief will not be effective in settling the controversy, the court may decline to grant

18. 28 U. S. C. A., 2201-2202.
19. 6 Moore's Federal Practice, 3007.

it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. . . ."[20]

The instant case differs only from the customary declaratory judgment action involving the problem of coverage,[21] in that it was on behalf of the victims against the insurer to determine whether or not the tortfeasor was an insured within the meaning of the omnibus or permissive use clause of an automobile liablity policy. The insurer did not contest the discretion of the court to entertain this action and instead filed a motion to require the action to include all claimants so that the determination of the effect of coverage would be binding upon all necessary parties.

The holding by the majority in the Court of Appeals is premised upon a mistaken assumption. The court assumes without basis that the pending suits in Delaware County would resolve the issue of insurance coverage. This is incorrect. First the personal representative of the Estate of Lynch is different from that of the Petitioner in the instant case. Moreover, the insurer is not a party and not only is the issue of coverage absent, but the naked question of insurance may not be raised. The mention of insurance is considered prejudicial and warrants the withdrawal of a juror except under highly exceptional circumstances.[22] Nor can the issue of coverage be resolved by implication for the action against Dutcher is grounded on agency. The burden of proof and the elements of proof as to agency are far more demanding than that required for establishing permissive use. A finding for the defendant, Dutcher, would still require another suit to determine whether or not Cionci was operating the vehicle under the permissive use clause. In addition, a finding for the Estate

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20. 6 Moore's Federal Practice, 3003.

21. *Glens Falls Indemnity Co. v. Fredericksen,* 8 F. R. D. 55 (D. C. Neb. 1947); *Northwest Cas. Co. v. Kirkman,* 119 F. Supp. 828 (D. C. N. C. 1954).

22. *Fleischman v. Reading,* 388 Pa. 183.

of Lynch would resolve nothing. The issue of coverage would have to await a separate garnishment action after a judgment for damages had been achieved against one or more of the defendants, which under the facts of this case would undoubtedly be the Estate of Cionci.

Professor Borchard in his monumental volume, Declaratory Judgments (2d Ed. 1941), at p. 299, set forth the principal criteria for exercising this discretion:

> "The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding."

It is not necessary that the entire litigation be settled by the declaratory judgment proceeding, but it will suffice if an important issue is resolved as Professor Borchard points out at p. 298:

> "In connection with the maxim that the discretion will be favorably exercised when the judgment will 'terminate the controversy giving rise to the proceedings,' the question has arisen whether the whole controversy of which the submitted issue is a part, must be settled, or whether only the narrow point in issue need be conclusively adjudicated. The answer is that only the narrow point in issue must be decided, although the presumption is that this point will settle some autonomous and independent issue of inherent importance, even should it not dispose of the entire litigation. For example, the petition of an insurance company that is by the facts exempted under the policy from the obligation to defend the insured or pay a judgment found against him does not go to the root of the whole litigation, especially the personal injury suit,

but it does decide the exoneration or duty to defend of one important party and thus presents a segregable independent autonomous issue which may be litigated to judgment."

Even assuming, arguendo, that Dutcher was a necessary party, this defect, if any, was obviated, when Dutcher was not only present but had an opportunity to be heard on the important question as to the scope of permission. This, Borchard indicates, is a proper alternative to the joining of a necessary party in interest and his being bound thereby.

At page 299, Borchard, in discussing when discretion is proper to hear a declaratory judgment action relating to an insurance contract, stated:

> "The discretion to refuse to exercise federal declaratory jurisdiction is properly applied when a state action is already pending which can easily adjudicate the entire issue between and among all the parties in interest; when it is sought to foreclose the rights of absent injured parties by an uncontested suit by insurer against the insured, in which the insured connives with the insurer or supplies the evidence to enable him to establish 'no coverage' or to decide crucial issues of fact by default; where the declaratory procedure is used for procedural fencing to enable the company to defeat a natural state jurisdiction."

None of these criteria are present in the instant case. On the contrary, this action eliminates this factor from multiple suits. There was no connivance or collusion in the instant case. On the contrary, the insurer resisted the plaintiffs strenuously. There was a full rapport between the insurer and Dutcher and Dutcher was willing and available in support of the insurer and did in fact testify for the insurer when permitted.

The cases cited by the majority opinion in support of the contention that the lower court erred in exercising its

discretion to hear the instant case provide little guidance. *A. L. Mechling Barge Lines, Inc. v. United States,* 368 U. S. 324 (1961) revolves around the question as to whether the issue is moot because the practice complained of was still evolving. It was primarily a suit attempting to establish a federal question in a dispute with the Interstate Commerce Commission. *Public Service Commission of Utah v. Wicoff Company, Inc.,* 344 U. S. 234, 241 (1952), relates to the delicate interplay between Federal Courts and state regulatory commissions and bears no relationship to the instant case except in the most general language. *Doby v. Brown,* 232 F. 2d 504 (4 Cir. 1956), relates to an absence of a federal question. *Aetna Casualty & Surety Company v. Quarles,* 92 F. 2d 321 (4 Cir. 1937), while cited by the majority opinion, affords little solace for their position. The Court in that case in refusing to exercise its discretion said:

> "As pointed out in a recent article (American Bar Association Journal, vol. XXIII, p. 553 et seq.), *the remedy prescribed by the Declaratory Judgment Act may furnish a convenient and appropriate remedy for use in many cases where a controversy has arisen over the coverage of an automobile liability insurance policy;* but the question in the case at bar relates not to the coverage of the policy but to the bona fides of a suit which had been instituted against the insured and which the company had been called upon to defend." (Emphasis supplied.) (page 325)

In *Brillhart v. Excess Insurance Company of America,* 316 U. S. 491, 86 L. Ed. 1620 (1942), the majority opinion utilized the general language of *Brillhart.* However, an examination of that case reveals that the opinion of this court precludes snap judgments by the appellate court as to whether discretion is or is not properly exercised. In the *Brillhart* case, the Court of Appeals without analysis, decided that the District Court had discretion to examine

the action despite the fact that the issues involved were identical to a case then pending in the State Court and in direct conflict with the principle that when another proceeding is pending in the suit in which all the matters in controversy between the parties can be fully adjudicated a declaratory judgment in the federal court is unwarranted.

This court required an examination into the actions pending in the state court litigation to determine whether or not such a conflict is in fact existing. This court set forth the standards of inquiry:

> ". . . This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, where necessary parties have been joined, whether such parties are amenable to process in that proceeding, . . ." (Page U. S. 495, L. Ed. 1625)

No such inquiry was made in the instant case. The language of the majority opinion clearly indicates their mistaken appraisal of the status of the state court actions.

On the other hand, the determination of the issue of permissive use has been repeatedly found to be a proper basis for the exercise of discretion in entertaining a declaratory judgment action. In *Nationwide Mutual Insurance Company v. Simms,* 231 F. Supp. 787 (D. Md. 1964), the court held under similar circumstances as the instant case except that the action had been brought by the insurer rather than one of the claimants that ". . . the injured defendants' contention is that the issue of permissive use presented in this court is entirely different from the issue of agency presented in the pending suits in the state court; different parties are involved; different parties carry the burden of proof and different elements of proof are required to prevail" (page 790).

See also *American Auto Insurance Company v. Fulcher*, 4 Cir. 1953, 201 F. 2d 751. See also *Northwestern Casualty Company v. Krikman*, N. D. N. C. 1954, 119 F. Supp. 828.

It has never been a bar to efficient use of declaratory judgment actions for determining coverage of automobile liability policies that there was then pending an action by the claimant against parties other than the insurer.[23] The result should not be any different where the claimants are the plaintiffs to an action. The present action has the merit of avoiding any conflict of interest on the part of the insurer. *Stout v. Grain Dealers Mutual Ins. Co.*, 307 F. 2d 521 (4th Cir., 1962).

Examining the broad perimeter of the facts of the instant case, the declaratory action herein posed singular economy. There was no purpose under the facts of the accident in proceeding against any other defendant than the estate of Cionci. Whatever may have been in the pleaders' minds in the other cases as to possible other defendants, the paucity of the evidence lent no hope of gain. To spin the wheels of justice needlessly was avoided by determining the pertinent and practical fact as to whether the sole tort feasor was to be afforded coverage and the fund available to compensate his victims.

CONCLUSION.

A rigid application of the indispensable party doctrine should not have been resurrected by the majority opinion in the Court of Appeals, especially in the light of the recent amendment to Federal Rule of Civil Procedure 19. It is erroneous for the majority to place the mantle of substantive law on this concept so as to insulate it from the prag-

23. *Ohio Casualty Ins. Co. v. Maloney*, 44 F. Supp. 312 (1942); *Associated Indemnity Corporation v. Garrow Co., Inc., et al.*, 125 F. 2d 462 (2d Cir., 1942); *Northwest Cas. Co. v. Kirkman*, 119 F. Supp. 828 (D. C. N. C. 1954); *Franklin Life Ins. Co. v. Johnson*, 157 F. 2d 653 (10th Cir., 1946).

matic determination required by Rule 19, which in itself marked the culmination of a determined effort by legal scholars to correct an inequity in the law. The decision of the majority if permitted to stand places a cloud of invalidity on the salutory amendment to Rule 19.

The majority opinion would sharply curtail and emasculate the discretion of the trial courts to entertain declaratory judgment actions, whereas in the instant case none of the possible parties objected to the proceedings, and where a determination that there was no coverage would have effectively terminated all litigation as futile.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A.

IN THE

COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA.

No. 1048.

DECEMBER TERM 1959.

IN TRESPASS.

JOHN L. HARRIS

v.

EDWARD S. DUTCHER, WILBERT M. MASSEY, ADMINISTRATOR D. B. N. OF THE ESTATE OF JOHN R. LYNCH, ALSO KNOWN AS JOHN ROBERTS LYNCH, DECEASED, AND GEORGE M. PATTERSON, ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, DECEASED.

Amended Complaint.

The Plaintiff, John L. Harris, brings this action in Trespass and complains and says:

1. The Plaintiff is an individual, over twenty-one (21) years of age, and resides at 725 Miller Street, Bryn Mawr, Pennsylvania.

2. The Defendant, Edward S. Dutcher, is an individual, residing at 901 Railroad Avenue, Bryn Mawr, Radnor Township, Delaware County, Pennsylvania, and was on or about January 17, 1958, the owner of a certain 1955 Mercury Sedan automobile.

3. The Defendant, Wilbert M. Massey, is the administrator D. B. N. of the Estate of John R. Lynch, also known as John Roberts Lynch, deceased, letters having been duly issued by the Register of Wills.

4. The Defendant, George H. Patterson, is the administrator of the estate of Donald Cionci, deceased, letters having been issued by the Register of Wills.

5. On or about January 17, 1958 at or about 4:30 o'clock P. M., Defendant, Edward S. Dutcher, was the owner of a 1955 Mercury automobile which was in charge of decedent, John R. Lynch, who was acting as the agent, servant and/or employee of Edward S. Dutcher in the scope and course of his agency or employment.

6. At the time aforesaid decedent, Donald Cionci, was driving the automobile of Edward S. Dutcher with the permission of and under the supervision, direction and control of John R. Lynch who was at the time the agent, servant, and/or employee of Edward S. Dutcher and acting within the scope and course of his employment, both acting in furtherance of the business of Edward S. Dutcher.

7. At the time aforesaid, the Plaintiff was an invited guest and passenger sitting in the rear seat of the automobile of Edward S. Dutcher and had no part or duty in the operation or control of said automobile.

8. At or about the time aforesaid, Donald Cionci was operating the automobile of Edward S. Dutcher on the business of Edward S. Dutcher, in a southerly direction on Bryn Mawr Avenue in Bryn Mawr, Delaware County, Pennsylvania, in a negligent, reckless, wilful and wanton manner.

9. That at the time and place aforesaid, Donald Cionci directed the course of said Mercury automobile across the center line of Bryn Mawr Avenue into the north bound lane of traffic at a high and dangerous rate of speed and

drove said Mercury automobile head-on into a Chevrolet pick-up truck being carefully driven by Thomas W. Smith in a northerly direction on Bryn Mawr Avenue.

10. The violent collision practically demolished the Mercury automobile of Edward S. Dutcher and as a result Plaintiff sustained injuries to various parts of his body to wit: comminuted fracture at distal end of left femur involving the knee joint; concussion; lacerations to various parts of his body and severe shock to his nervous system, all of which caused him great pain, agony, loss of sleep and inconvenience and in the future will probably cause him great pain, agony, loss of sleep and inconvenience and prevent him from attending his daily occupation.

11. As a result of the injuries sustained, the Plaintiff was obliged and in the future will be obliged to incur expenses in various sums of money for x-rays, medical attention, hospitalization, braces, appliances and therapy treatments in and about endeavoring to treat and cure himself to his great financial damage and loss. Expenses to date are as follows:

Hans W. Christopher, Inc., (leg brace)	$ 90.00
Dr. Gilman E. Heggestad, M. D.	450.00
Bryn Mawr Hospital	2,701.94
Bryn Mawr Hospital (Out-patient care)	50.00

12. Plaintiff avers that as a result of the injuries sustained he has suffered a permanent disability and is unable to perform the work he was performing prior to the accident.

13. By reason of the injuries sustained, Plaintiff was prevented from following his usual occupation as a laborer for James Barone, where he earned One Dollar and Forty Cents ($1.40) an hour thus suffering a loss of income; having been unable to perform any work from the date of the accident (January 17, 1958) to

14. The said collision and resulting injuries to the Plaintiff were caused solely and only by reason of the recklessness, carelessness and negligence of Edward S. Dutcher, Donald Cionci and John R. Lynch, inter alia, as follows:

(a) In operating said automobile at a high and excessive rate of speed, dangerous under the circumstances;

(b) In failing to have said automobile under proper and sufficient control so as to be able to stop it, if need be, to avoid such collision;

(c) In operating said automobile with defective brakes;

(d) In failing to use due care under the circumstances; and

(e) In failing to comply with the provisions of the Acts of Assembly and local Ordiances in such cases made and provided.

15. The Plaintiff was in no way negligent nor contributed to the aforesaid collision and injuries which he suffered.

WHEREFORE, Plaintiff, John L. Harris, demands judgment against the defendants in a sum in excess of Twenty Thousand ($20,000) Dollars, together with interest from January 17, 1958.

Attorneys for Plaintiff.

APPENDIX B.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA.

No. 1047.

DECEMBER TERM 1959.

IN TRESPASS

SARAH B. SMITH, ADMINISTRATRIX OF THE ESTATE OF THOMAS W. SMITH, DECEASED,

v.

EDWARD S. DUTCHER, WILBERT M. MASSEY, ADMINISTRATOR N. B. N. OF THE ESTATE OF JOHN R. LYNCH, ALSO KNOWN AS JOHN ROBERTS LYNCH, DECEASED, and GEORGE M. PATTERSON ADMINISTRATOR OF THE ESTATE OF DONALD CIONCI, DECEASED.

AMENDED COMPLAINT.

The Plaintiff, Sarah B. Smith, Administratrix of the Estate of Thomas W. Smith, Deceased, brings this action and complains and says:

1. Plaintiff, Sarah B. Smith, is the widow of the decedent, Thomas W. Smith, and Administratrix of the Estate of Thomas W. Smith, deceased, Letters of Administration having been issued to her by the Register of wills of Delaware County, Pennsylvania, on December 14, 1959.

2. Plaintiff brings this action on behalf of the Estate of Thomas W. Smith, Deceased, under and by virtue of the "Survival Actions" of the Commonwealth of Pennsylvania.

3. The Defendant, Edward S. Dutcher, is an individual residing at 901 Railroad Avenue, Bryn Mawr, Radnor Township, Delaware County, Pennsylvania, and was on or about January 17, 1958, the owner of a certain 1955 Mercury Sedan automobile.

4. The Defendant, Wilbert M. Massey is the administrator D. B. N. of the Estate of John R. Lynch, also known as John Roberts Lynch, deceased, letters having been issued by the Register of Wills.

5. The Defendant, George M. Patterson is the administrator of the Estate of Donald Cionci, deceased, letters having been issued by the Register of Wills.

6. The decedent, Thomas W. Smith, was the owner and operator of a certain 1955 Chevrolet pick-up truck which he operated on or about January 17, 1958, at or about 4:30 o'clock P.M., in a northerly direction on Bryn Mawr Avenue, Bryn Mawr, Delaware County, Pennsylvania.

7. At the time aforesaid, decedent, John R. Lynch, was in charge of the Automobile of Edward S. Dutcher as the agent, servant and/or employee of Edward S. Dutcher acting within the course and scope of his employment.

8. At the time aforesaid, decedent, Donald Cionci, was driving the automobile of said Edward S. Dutcher with the permission of and under the supervision, direction and control of John R. Lynch who was at the time the agent, servant and/or employee of Edward S. Dutcher and acting within the scope and course of his employment, both acting in furtherence of the business of Edward S. Dutcher.

9. At the time and place aforesaid, Donald Cionci operated the automobile of Edward S. Dutcher, on the business of said Edward S. Dutcher, in a southerly direc-

tion on said Bryn Mawr Avenue, in a negligent, reckless, wilful and wanton manner.

10. While both automobiles were proceeding in opposite directions, Donald Cionci operating the automobile of Edward S. Dutcher, under the supervision, direction and control of John R. Lynch and while on the business of Edward S. Dutcher, negligently and carelessly and at a high and dangerous rate of speed crossed the center of the street into the northbound traffic lane and drove said automobile head-on into the Chevrolet pickup truck which was at the time being operated by Thomas W. Smith in a careful and lawful manner, causing Thomas W. Smith to sustain serious injuries which injuries caused his death a few days later.

11. The said collision and injuries to the decedent, Thomas W. Smith, were caused solely and only by reason of the recklessness, carelessness and negligence of the defendants as follows:

(a) In operating said automobile at a high and excessive rate of speed, dangerous under the circumstances;

(b) In failing to have said automobile under proper and sufficient control, so as to be able to stop it if need be, to avoid such collision:

(b) In deliberately crossing the street into the path of the truck coming in the opposite direction and running head-on into plaintiff's truck;

(d) In failing to use due care under the circumstances;

(e) In acting in a gross disregard of the safety of others;

(f) In failing to comply with the Acts of Assembly and Local Ordinances in such case made and provided, and

(g) In otherwise failing to regard the rights of the decedent Thomas W. Smith.

12. The decedent, Thomas W. Smith, was not negligent, nor did he in any way contribute to the accident.

13. That at the time of the accident, Thomas W. Smith, was employed as a road foreman by Lower Merion Township earning approximately Four Thousand Five Hundred ($4,500.00) Dollars a year.

14. That the expenses incurred for medical attention and burial of Thomas W. Smith are as follows:

Bryn Mawr Hospital	$ 266.60
Handy B. Beckett (funeral expenses)	1105.00
Rolling Green Memorial Park, Inc. (Bronze Memorial)	221.56

15. That as a result of the aforementioned collision the Chevrolet truck of Thomas W. Smith was damaged, broken and bent in and about the front, motor chassis and left side to such an extent that it could not be repaired in a proper manner and therefore Thomas W. Smith suffered a loss in the value of said truck in the sum of Five Hundred Fifty ($550.00) Dollars, said truck being valued at Six Hundred Fifty ($650.00) Dollars just before the accident and having a salvage value of One Hundred ($100.00) Dollars after the accident.

16. The Plaintiff claims on behalf of the Estate of Thomas W. Smith, Deceased, the damages suffered by Thomas W. Smith and his estate as well as the pain and suffering Thomas W. Smith underwent prior to his death.

WHEREFORE, Plaintiff demands judgment against the Defendants in a sum in excess of Five Thousand ($5000.00) Dollars together with interest from January 17, 1958.

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Attorneys for Plaintiff.

APPENDIX C.

Federal Declaratory Judgment Act.

CHAPTER 151—DECLARATORY JUDGMENTS

* * *

§ 2201. CREATION OF REMEDY

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85—508, § 12(p), 72 Stat. 349.

* * *

Federal Rules of Civil Procedure.

Rule 19.

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii)

leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any person as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23.

* * *

SUPREME COURT, U. S.

SEP 25

JOHN F. DAVIS

IN THE

Supreme Court of the United States

October Term, 1967.

No. 28.

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Admr. of the Estate of JOHN R. LYNCH, a/k/a JOHN ROBERT LYNCH, Deceased,

Petitioner,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, Admx. of the Estate of THOMAS W. SMITH, Deceased

v.

LUMBERMENS MUTUAL CASUALTY COMPANY

and

GEORGE W. PATTERSON, Admr. of the Estate of DONALD CIONCI, Deceased.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

NORMAN PAUL HARVEY,
Fourth Floor,
Seven Penn Center Plaza,
Philadelphia, Pa. 19103,
Attorney for Respondent.

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

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QUESTIONS PRESENTED.

1. When an automobile owned by the named insured in an automobile liability insurance policy is lent to an operator, who is killed in a car collision causing additional deaths and serious injury and the insurer refused coverage to operator's estate as defendant in multi-party suits, both in state and federal courts, in which the insured was not a party and the issues different, was not a declaratory judgment action against the insurer to determine coverage under the permissive use clause, in which all the victims were joined as plaintiffs, within the sound discretion of the trial judge?

2. Under the above circumstances, where the named insured is not a party to the declaratory judgment action but is a defendant in tort actions pending in a state court where he may have judgments entered against him, and may suffer prejudice as a result of the judgment in the declaratory judgment action, and where the insurer may also suffer prejudice in the form of double liability and multiplicity of suits, and where the plaintiffs have full and adequate remedies in a forum where all parties can be joined, is it error to dismiss the declaratory judgment action since consideration of all the factors indicates that the court could not, in equity and good conscience, proceed to judgment in the absence of the named insured?

ARGUMENT.

A federal court of appeals has the power and the duty to vacate a judgment of a district court, and to order the dismissal of an action, where it is found that the district court judgment is based upon principles of law which are contrary to the opinions of the Supreme Court or to rules promulgated by the Supreme Court for procedural guidance of lower courts. The Court of Appeals for the Third Circuit exercised its power and performed the duty imposed because the Court recognized that justice could not be done to *all* parties in the absence of Dutcher, the named insured in the automobile liability policy issued by Respondent. Since the judgment of the lower court was violative of fundamental rights of both Dutcher, the absent party, and Respondent; and since the judgment could not achieve the purpose which justifies entertaining an action for a declaratory judgment, the lower court abused its discretion in proceeding to judgment.

Since the object of all rules of law, whether substantive or procedural, is the attainment of justice, the process of reasoning toward the object must not be confused by the use of terms in the premises which are only proper in the conclusion. The Court of Appeals avoided substituting labels for reasoning effectively in the opinion filed in this case. The Respondent will attempt to follow the same course and to avoid any blind reliance upon conclusory terms. It is only after considering all of the facts as they relate to Dutcher, the absent person, and all of the parties, that it becomes clear that the absence of Dutcher made it impossible for the trial court to do justice to all the parties. When that conclusion is reached, the term "indispensable" may be used, not as a reason but as the result of reasoning.

Whether old Rule 19 or new Rule 19 or neither applies to the instant case, the result must be the same. The Rules of Civil Procedure for the United States District Courts cannot establish standards or criteria which would deprive any person of justice and should not be interpreted in such fashion as to bring about that result. Some writers[1] on the subject of parties expressed the view that some courts did not have a correct understanding of what is meant by jurisdiction and did not give all the reasons for their opinions that the writers felt were necessary. New Rule 19 is in the nature of an instruction to the judges of the federal district courts with respect to the concepts they should form: concepts of equity and good conscience; and some of the facts they should consider in forming these concepts which, when formed, will determine whether or not the action should be dismissed or retained. New Rule 19 does not purport to list all the criteria which may be considered by the court but merely states that those specified should be included [Rule 19(b)].

Considered in the light of the opinions of this Court from earliest times, and the opinions of inferior courts guided thereby, new Rule 19 does not create any new law nor construct new bases on which to found determinations of controversies. The need for equitable and conscience-guided evaluations always has been, and the various criteria are discussed and considered in various opinions.[2]

The facts of the instant case, the positions in which the parties would find themselves if the judgment of the lower court were permitted to stand, the positions in which they

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[1] Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327 (1957) and Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Col. L. Rev. 1254 (1961).

[2] **Elmendorf v. Taylor,** 23 U. S. (10 Wheat.) 152, 166-67 (1825); **Mallow v. Hinde,** 25 U. S. (12 Wheat.) 193, 197 (1827); **Payne v. Hook,** 74 U. S. (7 Wall.) 425 (1868); **Roos v. Texas Co.,** 23 F. 2d 171 (2 Cir. 1927).

would be if the action of the Court of Appeals is affirmed, and the contentions of the Petitioner will be examined with reference to new Rule 19. In so doing the use of the term "pragmatic" must be avoided as a "label" more likely to cause confusion than the labels which the theorists condemned in their criticisms of the courts. If the factors enumerated in section (b) of Rule 19 are labeled "pragmatic" it is in the sense of "practical and efficient" not "pragmatic sanction."

Petitioner states in the preamble to its argument: "The record indicates that the interest of the named insured (Dutcher) was contingent and highly remote."[3]. However, during a conference with the Trial Judge, counsel for Petitioner argued with effect that Dutcher's interest was of major importance saying . . . "it is of immediate gain or loss to Dutcher on what happens in this case, . . ." and ". . . he (Dutcher) has a direct gain or loss in this cause of action, . . ." (R. 91). It was on the basis of this argument that the Trial Judge declared Dutcher incompetent and refused to permit him to testify in the action brought by Petitioner (R. 190).

Immediately following the statement with respect to the interest of Dutcher, Petitioner purports to interpret the allegations of negligence in the Complaints in Trespass filed in Delaware County by Harris and the Smith Estate[4] and writes that the causes of action are "grounded in agency." The statement is only partially correct. The Complaint of Harris in paragraph 14 (c) charges that Dutcher's automobile had defective brakes and in 14 (e) that he failed to comply with Acts of Assembly and local ordinances. The Complaint of the Smith Estate charges Dutcher with violation of Acts of Assembly and local ordinances. Under

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[3] Petitioner's Brief, p. 8, para. 3.

[4] Petitioner's Brief, pp. 32 and 35.

these pleadings evidence could be introduced to support a finding that Dutcher was liable without reference to agency. Obviously, no one can predict that there can be no proof of agency.

Petitioner states Respondent has not sought any disposition of the tort actions in Delaware County. Neither have the plaintiffs, nor has the Cionci Estate. It is apparent from the dealings between Petitioner and the Cionci Estate that had Petitioner any desire to have the tort actions tried, the Cionci Estate would have ordered them down. The impecunious Cionci Estate settled with Petitioner for $50,000,[5] the exact amount of Respondent's coverage available for the bodily injury or death of one person. This was certainly cooperation. And the amount of the settlement might be considered in evaluating the statement of the Petitioner[6] to the effect that Respondent's policy limits were first disclosed in its brief and that Petitioner "effectively shielded the policy limits from discovery."[7]

Toward the end of preamble to its argument, Petitioner says:[8]

> "The owner of the vehicle, the named insured, not being a party to this action, his interest in the finite limits of the policy cannot be affected and he would stand to benefit by an active participation of the insurer in a defense on the merits as to the estate of the operator."

That part of the first sentence which relates to the interest of the named insured (Dutcher) is in striking contrast to the theory on which the Petitioner tried its case (R. 91), as

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[5] Petitioner's Brief, p. 4.

[6] Brief for Petitioner, p. 15.

[7] Brief for Petitioner, p. 19.

[8] Brief for Petitioner, p. 8.

hereinbefore discussed at page 4, and as a result of which the key ruling of Dutcher's incompetence was made. The position now taken by Petitioner is that taken by Respondent in the Court of Appeals. There it was pointed out that Dutcher could not be bound by the judgment of the District Court. Under the doctrine of *Maryland Casualty Co. v: Pacific Coal and Oil Co., et al.*, 312 U. S. 270, 274, 61 Supreme Ct. Rep. 510 (1941), the federal court should not entertain a declaratory judgment action if its judgment will not bind a person who is free to go into a state court where the judgment may be exactly opposite the finding in the federal court.

The second part of the first sentence quoted above is at variance with Petitioner's contention that Dutcher does not stand in any peril with respect to the tort actions against him. If the latter contention were correct, Dutcher would have no interest in Respondent's participating in the defense of the Cionci Estate. However, he is in peril and that is one of the reasons the action of the Court of Appeals should be affirmed. This reason will be discussed hereinafter in conjunction with other reasons for affirmance.

No Judgment Consistent With Justice To All Parties And The Absent Person Can Be Rendered Unless No One Of Them Will Suffer Substantial Harm By The Operation Of Such Judgment.

The foregoing proposition may be labeled a truism or attacked as a platitude. The same may be done with respect to the assertion that one plus one equals two, but that assertion is not being denied nor is imaginative thinking, or the so-called "pragmatic" approach resulting in its being replaced in selected mathematical equations to achieve a predetermined answer.

The plain fact is that no judgment could be rendered in this case which would not seriously affect Dutcher and Respondent. That is the reason the Court of Appeals ordered the District Court to dismiss. There was no blind reliance on the term "indispensable" because the Court did not arrive at a conclusion as to indispensability until consideration had been given to the interests of Dutcher. The magnitude of Dutcher's interest was successfully urged upon the Trial Judge by Petitioner and the latter was obviously impressed and followed the path chosen by Petitioner. So doing led to an erroneous ruling on evidence and the unfortunate decision to tell the jury that it had to find in favor of the Lynch and Smith Estates but could find a different verdict in the Harris case although it was impossible for the operative facts to be any different in the death cases than in the injury case. However, Dutcher's right that this case should not be tried involves a great deal more than is spelled out in the opinion of the Court because a court does not have to go into minute detail for every proposition it states. The dissenting opinion does not evidence a realization of, or, at least does not mention or give any effect to, the problems the judgment creates for Dutcher. It takes some notice of the problems created for Respondent by this piece-meal handling of the coverage problem and seeks to foreclose consideration of any problem not recognized or discussed by writing: "Any other practical contingencies which imagination may suggest are of no legal consequence" (R. 255).

The first factor which Rule 19 (b) recommends to the consideration of a court is existence of prejudice, by reason of non-joinder, to the absent person or those already parties.

(a) The absent person, Dutcher, will be prejudiced if the judgment of the District Court is affirmed.

Dutcher is entitled to the full protection of his policy if, as he has testified, Cionci violated the permission given to him and Lynch to use the Dutcher vehicle for a limited purpose. However, a judgment which does not bind him says his insurance carrier must pay, at least to the limit of the policy, any sums adjudged due the estates of the deceased persons, and the bodily injury claimant. Suits on behalf of one deceased and the injured party are pending in the state court in Delaware County, Pennsylvania. The Cionci Estate has consented to a judgment against it in the amount of $50,000 in the federal district court in Philadelphia.

Statements in the dissenting opinion which speculate concerning the possibility that Dutcher will not find himself in conflict with the Cionci Estate for the benefit of the limited coverage of Respondent's policy are unrealistic (R. 253). There is open a death case and a severe bodily injury claim. Neither the District Court nor the Court of Appeals had information upon which to base any judgment as to the settlement value or verdict exposure in those cases. If any conclusion is to be reached, in light of the fact that one death case was settled for $50,000, it would be that there will be a conflict between Dutcher and the Cionci Estate. Accepting the possibility of a conflict, it is suggested by the dissenting judge (R. 254) that Dutcher make claim of "superiority" over Cionci's Estate to indemnity under the policy. There is no suggestion as to what the term "superiority" means. If Dutcher prevails over the Cionci Estate, the latter has no right to the fund as far as Dutcher is concerned. There will be no superior and inferior rights. But there will be a judgment in one court contrary to another

judgment in the same court or another court, depending upon whether Dutcher sues in the federal district court or a state court, and that is exactly the situation that this Court said should be avoided in the case of *Maryland Casualty Co. v. Pacific Coal & Oil Co., et al.*, 312 U. S. 270, 274, 61 Supreme Ct. Rep. 510 (1941). It was there held that a federal court should not entertain a case where its decree cannot bind a party who is free to go into a state court where he may obtain a judgment directly opposite that obtained in the federal court. In the instant case, Dutcher could sue the Respondent and the Cionci Estate in the federal court in Philadelphia and obtain a judgment which would deny coverage to the Cionci Estate and require that the Lumbermens preserve its entire coverage for his protection. In short, Dutcher can obtain both state and federal court judgments contrary to the judgment of the District Court in this case.

All of this expense and inconvenience would be foisted upon Dutcher because of a judgment in a case where he was not a party.

While there are cases where relief has been shaped and imaginative decrees entered, no reference is made in the dissenting opinion or in the brief for Petitioner to any such decree where the contraindications were as in this case. No decree can be entered commanding Dutcher not to institute suits for his protection because the Court has no jurisdiction over Dutcher and no power to forbid him to bring such suits. The idea that Dutcher would bring suits is not speculative as are the various hypotheses in the dissenting opinion and the brief of Petitioner. Indeed, it is not speculative. One would be justified in stating with a great deal of assurance that suits will be brought. What will the decree provide in respect of judgments, one of which holds, in effect, that the Cionci Estate may have full use of the fund Dutcher has created for his protection and another which

says the Cionci Estate shall have no right to any part of the fund.

All that is said with respect to the proposed decree is that Respondent will not be required to make any payment under the policy until the tort actions have gone to final judgment and Dutcher's claims to coverage have been settled (R. 254). Very conservatively this means a delay of three to four years. At the end of that time there will be, in all likelihood, irreconcilable judgments.

Since the dissenting opinion has mentioned that more than eight years had passed since the date of accident (R. 256), which occurred January 17, 1958, it must be noted that neither Dutcher nor Respondent had anything to do with timing. Petitioner apparently did not want to bring its tort action in Delaware County where the accident happened and where Lynch, Cionci, Smith, Harris and Dutcher lived at the time of the accident and where the survivors lived thereafter. Cionci's widow and parents failed to apply for Letters of Administration and an out-of-state person, unrelated to decedent, was chosen and appointed. Diversity was thus created and suit brought in Federal Court. This all took time. After suit was instituted, by agreement for the attorneys for Petitioner and the Cionci Estate, the case was removed from the non-jury trial list. The declaratory judgment action was instituted June 5, 1959 (R. 2) but was not ordered on the trial list until September 25, 1959 (R. 3). It was tried in December, 1962 (R. 8). Had the Respondent, or any plaintiff, thought time to be of any importance, all actions would have been brought in Delaware County and every aspect of liability and coverage determined within two years.

Should judgments against Dutcher in the tort actions of the Smith Estate and Harris be less than the coverage provided by Respondent, the latter could take an appeal, if indicated, on behalf of Dutcher and file a supersedeas bond.

But, if the sum of those judgments and the judgment of $50,000 in favor of the Lynch Estate against the Cionci Estate is in excess of Respondent's coverage, the Respondent could render itself liable for more than its coverage. Dutcher would be justified in taking the position that, since he is not bound by the judgment in the instant case, Respondent must furnish the bond. The latter saying it is bound by the judgment in the instant case would contest the obligation to furnish bond. If the decree provides that the plaintiffs may not execute on their judgments but must await the outcome of the appeal, even though no supersedeas bond has been filed, such decree would constitute an interference with the state court's control of its own judgments in a situation where the federal court jurisdiction is based solely upon diversity. If the decree does not so provide, Dutcher's appeal cannot be processed effectively because the Smith Estate and Harris can collect the judgments before the appeal could be heard. There is nothing in the dissenting opinion to indicate what the decree would provide in the situation set forth. Dutcher may decide to take no action with respect to the coverage of the policy until judgments have been entered in the tort actions in the state courts. Before the coverage question is decided execution might be had on the state court judgments and there would be a judgment against Dutcher, unsatisfied by the amount that the sum of all judgments exceeded coverage even though he is not bound by the judgment in the instant case. The only alternative would be for the Respondent to commit itself to an obligation in excess of its coverage. The dissenting opinion contains a reference (R. 253, fn. 7) to a clause in the policy which provides that the "inclusion herein of more than one insured shall not operate to increase the limits of the company's liability." The problem would be to interpret the clause if one court says the Cionci Estate is an insured and the other court says it is not. Dutcher, successful in a

coverage action, would say he is the only insured. Respondent, if the judgment of the District Court is affirmed, would say that there are two insureds. The problem will be quite complex if Dutcher obtains judgment against Respondent in the same court where the Lynch Estate got a judgment against Respondent on exactly the same facts established by the same testimony. In that event, the District Court in another suit will have to decide whether Dutcher is the only insured, as his judgment will hold, or must share his coverage with another insured in accordance with the judgment of the Court in the instant case. It is this type of confusion that demonstrates the futility of employing what amounts to pragmatic sanction, under the guise of pragmatic approach, and indicates the utility of law founded upon concepts of justice which have been enunciated by this Court and used as a basis for new Rule 19.

In *Payne v. Hook,* 74 U. S. (7 Wall. 425 (1868)), cited in the minority opinion (R. 252, fn. 5), there is no indication of any dispute between the distributees of the fund from which the plaintiff asked only for his share. In the instant case it is obvious that Dutcher must have the entire fund for his protection. This Court in that case said the absent parties could come in and share the benefits of the litigation at a later date. The absent party in the instant case, Dutcher, cannot come in and share any benefits of the instant litigation because, so far as he is concerned, there are no benefits to share. The opinion in Payne drew attention to the prevention of a multiplicity of suits by permitting the case to proceed. Upon analysis of the various aspects of the case now before the Court, it is clear that extensive litigation and numerous suits must result from the procedure suggested in the minority opinion.

(b) The Respondent will be prejudiced if the judgment of the District Court is affirmed.

In his article entitled "Compulsory Joinder of Parties in Civil Actions", 55 Michigan Law Review 327, 334, Reed expresses the thought that a court should not concern itself with the controversy between the parties in court if the absent person is so intimately related to the controversy that further litigation will be required to establish his position. And later (p. 356) advocates ". . . an informal, rational balancing of competing interests case by case—interests relating to the helplessness of plaintiff, double vexation of defendant, the possible effect on absent parties, the convenience of the Court, and the equity and good conscience—in short, the justice, of the end result."

In *Shields v. Barrow,* 58 U. S. (17 How.) 130, 139 (1854), this Court said:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Fink in his article entitled "Indispensable Parties and the Proposed Amendment to Federal Rule 19" 74 Yale Law Journal 403, 405 discussing the above quotation says:

> "The second [reason] looks to the protection of the parties presently before the Court, and society in general, from repetitious, abortive, and vexatious litigation. Thus a person may be deemed to be an indispensable party if, without his presence, the defendant in the present litigation will be subjected to double vexation with the possibility of inconsistent results. The absent

person must be joined so that he will be bound by the outcome of the present action [Davenport v. Dows, 85 U. S. (18 Wall.) 626, 627 (1874)]."

The theme of the Respondent's discussion of the problem before the Court is, in the words of Professor Reed, ". . . the justice of the end result." Rule 19 specifically provides for the dismissal of an action when, after analyzing all the ramifications of the total situation, it is found that the absent person is indispensable. It would seem to be a contradiction in terms to say that, even though the absent person is indispensable, anyone who would be injured by his absence, does not have a substantive right to dismissal. If, in equity and good conscience, the case may not proceed to judgment, doing so would constitute violation of the right of due process of law.

Examining the instant case with reference to the case law, Rule 19, and the studies made by Reed and Fink, it is seen that the judgment of the District Court would subject Respondent to double vexation, double liability, prejudicial interference with the defense of its insured and inconsistent judgments. These are not contingencies suggested by imagination with no legal consequences. Because the rights of Dutcher, the absent person, and Respondent are so intimately related and intertwined, much that has been said regarding prejudice to Dutcher indicates prejudice to Respondent. If Dutcher does not bring actions against Respondent to protect himself, Respondent must do so in an effort to avoid double liability. Respondent cannot await the outcome of the trespass actions in the state court because decisions will have to be made immediately with respect to motions or appeals on behalf of Dutcher, and the Respondent must have a judgment determining Dutcher's rights in relation to the rights of the Cionci Estate in order to make such decisions. Consideration of the practical problems involved

refute the intimation in the dissenting opinion that this is a very simple matter and that the all-important object is to preserve the verdict of a jury.

The minority opinion goes far beyond Rule 19 and the reasoning of Reed and Hazard, whose commentaries are thought to have had some influence on the formulation of the rule, by failing to consider some of the recommended tests.

As indicated in the above quotation from Reed's article, interests relating to the helplessness of the plaintiff are to be considered. In this case the Petitioner is not helpless. It has a forum where all parties could be joined and it always has had such forum. This is not a case where the plaintiff must obtain relief in the forum he chooses or have no relief.

It is submitted that equity and good conscience, the concept being formed after consideration of the various factors outlined in Rule 19, forbids the action suggested by the minority and calls for an affirmance of the order of the Court of Appeals. Prejudice to the absent party and to Respondent have been discussed. No adequate decree can be fashioned and the Petitioner unquestionably has an adequate remedy if the action is dismissed. The Petitioner had a remedy before it tried the declaratory judgment action. It had a judgment against the Cionci Estate and could have proceeded directly against the insurance carrier by garnishment. If Petitioner sought some advantage by electing to pursue a different course, it is only just that it should bear the burden when it develops, as it has, that an adequate judgment cannot be rendered.

The Declaratory Judgment Action Brought by the Estate of a Deceased Passenger to Determine Whether the Insolvent Estate of the Deceased Operator Is Insured Within the Terms of an Automobile Liability Policy, Absent Objections from Other Claimants or the Insurer Is Not Within the Sound Discretion of the Trial Court.

The opinion of the Court of Appeals states:

> "[T]he District Court erred in that in the appropriate exercise of its discretion it should have denied relief without consideration of the merits in view of the fact that two pending actions in a state court, earlier referred to, in which the here absent Dutcher, as well as the Cionci, Lynch and Smith estates, and Harris, were parties, presented the critical mooted question as to the coverage of Lumbermens' policy at issue in the instant declaratory judgment action" (R. 225).

The Petitioner contends in its brief (p. 21) that the Court of Appeals premised its holding with respect to the propriety of the District Court's hearing the declaratory judgment action on a mistaken assumption. It must be assumed that the reference is to that part of the opinion set forth above. It would seem that Petitioner misunderstands what the Court said. There can be no doubt that the Court understands that the tort actions and the coverage questions cannot be tried simultaneously. The quoted section of the opinion can only mean that the outcome of the tort actions might render the coverage question moot. Furthermore, if the coverage question had to be decided, all of the parties that could conceivably be affected would be parties in the trial of the coverage question because subsequent to the disposition of the tort action attachment executions could be

issued, service of interrogatories made upon the insurer, and the coverage question tried. It certainly makes no difference that the personal representative of the Lynch Estate in Delaware County is not the same as the personal representative of the Lynch Estate in the declaratory judgment action. So far as coverage is concerned, the identity of the personal representative is of no significance. Obviously the issue of coverage cannot be resolved on the basis of findings with respect to agency and there is no suggestion in the opinion of the Court that that could be done. Petitioner errs in stating that another suit would be required to determine coverage in Delaware County. Coverage can be simply determined by the garnishment action.

Accepting the statement of the principal criteria for rendering declaratory judgments as being (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding (brief, p. 22) it is immediately apparent that the judgment in the instant case accomplishes neither of these purposes. All that has been heretofore said regarding matters not settled and questions that must be resolved by further litigation is pertinent.

The impropriety of proceeding with the declaratory judgment action is covered by the opinion of the Court and there would seem to be no point in attempting to re-work what has been set forth. It would seem to suffice to point out that maintaining jurisdiction of the declaratory judgment action is contrary to the holding of this Court in *Maryland Casualty Co. v. Pacific Coal & Oil Co., et al.*, 312 U. S. 270, 274, 61 Supreme Court Rep. 510 (1941).

In that case an injured man was joined in a declaratory judgment action brought by an insurance carrier against its named insured. The Court of Appeals affirmed the action of the District Court which had sustained a demurrer by the

injured man. This Court reversed and held that he must remain a party to the action. The reason given was that the federal court might determine the question in one way, its declaration not being binding on the injured man, and the state court might enter a contrary judgment.

CONCLUSION.

The absent person is an indispensable party whether the conclusion with respect to indispensability is based upon case law, as enunciated by this Court prior to Rule 19, or application of Rule 19, the same standards being applicable under either and Rule 19 specifically recognizing the concept of indispensability where, as in the instant case, an effective judgment cannot be rendered.

This is not a proper case for a declaratory judgment action because it cannot settle the legal rights of all persons concerned, would result in trying the controversy piecemeal and makes possible irreconcilable judgments on the issue.

Respectfully submitted,

NORMAN PAUL HARVEY,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 28.—October Term, 1967.

Provident Tradesmens Bank & Trust Co., Administrator of the Estate of John R. Lynch, etc., Petitioner, *v.* George M. Patterson, Administrator of the Estate of Donald Cionci, et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 29, 1968.]

Mr. Justice Harlan delivered the opinion of the Court.

This controversy, involving in its present posture the dismissal of a declaratory judgment action for nonjoinder of an "indispensable" party, began nearly 10 years ago with a traffic accident. An automobile owned by Edward Dutcher, who was not present when the accident occurred, was being driven by Donald Cionci, to whom Dutcher had given the keys. John Lynch and John Harris were passengers. The automobile crossed the median strip of the highway and collided with a truck being driven by Thomas Smith. Cionci, Lynch, and Smith were killed and Harris was severely injured.

Three tort actions were brought. Provident Tradesmens Bank, the administrator of the estate of passenger Lynch and petitioner here, sued the estate of the driver, Cionci, in a diversity action. The administrator of Smith, and Harris in person, each brought a state-court action against the estate of Cionci, Dutcher the owner, and the estate of Lynch. These Smith and Harris actions, for unknown reasons, have never gone to trial and are still pending. The Lynch action against Cionci's

estate was settled for $50,000, which the estate of Cionci, being penniless, has never paid.

Dutcher, the owner of the automobile and a defendant in the as yet untried tort actions, had an automobile liability insurance policy with Lumbermens Mutual Casualty Company, respondent here. That policy had an upper limit of $100,000 for all claims arising out of a single accident. This fund was potentially subject to two different sorts of claims by the tort plaintiffs. First, Dutcher himself might be held vicariously liable as Cionci's "principal"; the likelihood of such a judgment against Dutcher is a matter of considerable doubt and dispute. Second, the policy by its terms covered the direct liability of any person driving Dutcher's car with Dutcher's "permission."

The insurance company had declined, after notice, to defend the estate of Lynch's tort action against the estate of Cionci, believing that Cionci had not had permission and hence was not covered by the policy. The facts allegedly were that Dutcher had entrusted his car to Cionci, but that Cionci had made a detour from the errand for which Dutcher allowed his car to be taken. The estate of Lynch, armed with its $50,000 liquidated claim against the estate of Cionci, brought the present diversity action for a declaration that Cionci's use of the car had been "with permission" of Dutcher. The only named defendants were the company and the estate of Cionci. The other two tort plaintiffs were joined as plaintiffs. Dutcher, a resident of the State of Pennsylvania as were all the plaintiffs, was not joined either as plaintiff or defendant. The failure to join him was not adverted to at the trial level.

The major question of law contested at trial was a state law question. The District Court had ruled that, as a matter of the applicable (Pennsylvania) law, the driver of an automobile is presumed to have the per-

mission of the owner. Hence, unless contrary evidence could be introduced, the tort plaintiffs, now declaratory judgment plaintiffs, would be entitled to a directed verdict against the insurance company. The only possible contrary evidence was testimony by Dutcher as to restrictions he had imposed on Cionci's use of the automobile. The two estate plaintiffs claimed, however, that under the Pennsylvania "Dead Man Rule" Dutcher was incompetent to testify on this matter as against them. The District Court upheld this claim. It ruled that under Pennsylvania law Dutcher was incompetent to testify against an estate if he had an "adverse" interest to that of the estate. It found such adversity in Dutcher's potential need to call upon the insurance fund to pay judgments against himself, and his consequent interest in not having part or all of the fund used to pay judgments against Cionci. The District Court, therefore, directed verdicts in favor of the two estates. Dutcher was, however, allowed to testify as against the live plaintiff, Harris. The jury, nonetheless, found that Cionci had had permission, and hence awarded a verdict to Harris also.

Lumbermens appealed the judgment to the Court of Appeals for the Third Circuit, raising various state-law questions.[1] The Court of Appeals did not reach any of these issues. Instead, after reargument *en banc*, it decided, 5–2, to reverse on two alternative grounds neither of which had been raised in the District Court or by the appellant.

The first of these grounds was that Dutcher was an indispensable party. The court held that the "adverse interests" that had rendered Dutcher incompetent to

[1] Appellants challenged the District Court's ruling on the Dead Man issue, the fairness of submitting the question as to Harris to a jury that had been directed to find in favor of the two estates whose position was factually indistinguishable, and certain instructions.

testify under the Pennsylvania Dead Man Rule also required him to be made a party. The court did not consider whether the fact that a verdict had already been rendered, without objection to the nonjoinder of Dutcher, affected the matter. Nor did it follow the provision of Rule 19 of the Federal Rules of Civil Procedure that findings of "indispensability" must be based on stated pragmatic considerations. It held, to the contrary, that the right of a person who "may be affected" by the judgment to be joined is a "substantive" right, unaffected by the federal rules; that a trial court "may not proceed" in the absence of such a person; and that since Dutcher could not be joined as a defendant without destroying diversity jurisdiction the action had to be dismissed.

Since this ruling presented a serious challenge to the scope of the newly amended Rule 19, we granted certiorari. 386 U. S. 940. Concluding that the inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the Rule was designed to avoid, we reverse.

I.

The applicable parts of Rule 19 read as follows:

> "Rule 19. Joinder of Persons Needed for Just Adjudication
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> "(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to

protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined the court shall order that he be made a party. If he should join as a plaintiff, but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

We may assume, at the outset, that Dutcher falls within the category or persons who, under § (a), should be "joined if feasible." The action was for an adjudication of the validity of certain claims against a fund. Dutcher, faced with the possibility of judgments against him, had an interest in having the fund preserved to cover that potential liability. Hence there existed, when this case went to trial, at least the possibility that a

judgment might impede Dutcher's ability to protect his interest, or lead to later relitigation by him.

The optimum solution, an adjudication of the permission question that would be binding on all interested persons, was not "feasible," however, for Dutcher could not be made a defendant without destroying diversity. Hence the problem was the one to which Rule 19 (b) appears to address itself: in the absence of a person who "should be joined if feasible," should the court dismiss the action or proceed without him? Since this problem emerged for the first time in the Court of Appeals, there were also two subsidiary questions. First, what was the effect, if any, of the failure of the defendants to raise the matter in the District Court? Second, what was the importance, if any, of the fact that a judgment, binding on the parties although not binding on Dutcher, had already been reached after extensive litigation? The three questions prove, on examination, to be interwoven.

We conclude, upon consideration of the record and applying the "equity and good conscience" test of Rule 19 (b), that the Court of Appeals erred in not allowing the judgment to stand.

Rule 19 (b) suggests four "interests" that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled.[2] Each of these interests must, in this case, be viewed entirely from an appellate perspective since the matter of joinder was not considered in the trial court. First, the plaintiff has an interest in having a forum. Before the trial, the strength of this interest obviously depends

[2] For convenience, we treat these interests in a different order from that appearing in Rule 19 (b). Our list follows that of Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327, 330 (1957).

upon whether a satisfacory alternative forum exists.[3] On appeal, if the plaintiff has won, he has a strong additional interest in preserving his judgment. Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. After trial, however, if the defendant has failed to assert this interest, it is quite proper to consider it foreclosed.[4]

Third, there is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res judicata* as to, or legally enforceable against, a nonparty.[5] It obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the con-

[3] The Advisory Committee on the Federal Rules of Civil Procedure, in its Note on the 1966 Revision of Rule 19, quoted at 3 Moore, Federal Practice ¶ 19.01 (hereinafter cited as "Committee Note") comments as follows on the fourth factor listed in Rule 19 (b), the adequacy of plaintiff's remedy if the action is dismissed: "[T]he court should consider whether there is any assurance that the plaintiffs, if dismissed, could sue effectively in another forum where better joinder would be possible." See *Fitzgerald* v. *Haynes*, 241 F. 2d 417, 420 (C. A. 3d Cir.); *Fouke* v. *Schenewerk*, 197 F. 2d 234, 236.

[4] The Committee Note comments that "when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person . . . and is not seeking vicariously to protect the absent person against a prejudicial judgment . . . his undue delay in making the motion can properly be counted against him as a reason for denying the motion." Of course, where an objection to nonjoinder has been erroneously overruled in the district court, the court of appeals may correct the error to prevent harassment of defendants. *Young* v. *Powell*, 179 F. 2d 147.

[5] See the discussion by Reed, *supra*, n. 2, at 330–335. See also Hazard, Indispensable Party: The Historical Origins of a Procedural Phantom, 61 Col. L. Rev. 1254 (1961).

trary) a court may always proceed without considering the potential effect on nonparties simply because they are not "bound" in the technical sense.[6] Instead, as Rule 19 (a) expresses it, the court must consider the extent to which the judgment may "as a practical matter impair or impede his ability to protect" his interest in the subject matter. When a case has reached the appeal stage the matter is more complex. The judgment appealed from may not in fact affect the interest of any outsider even though there existed, before trial, a possibility that a judgment affecting his interest would be rendered.[7] When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below.[8]

Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be "adequate," to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them. After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent.

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[6] See *Keegan* v. *Humble Oil & Refining Co.*, 155 F. 2d 971.

[7] See *Bourdieu* v. *Pacific Oil Co.*, 299 U. S. 65, where this Court held that an inquiry into indispensability would be unnecessary where the complaint did not state a cause of action. But see *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216, criticized, 2 Barron & Holtzoff, Federal Practice & Procedure § 516 (1966 Supp.) (Wright ed.).

[8] *E. g., Hoe* v. *Wilson*, 9 Wall. 501. See generally 2 Barron & Holtzoff, Federal Practice & Procedure § 516 (1966 Supp.) (Wright ed.).

Rule 19 (b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests. Commentators had argued that greater attention should be paid to this potential solution to a joinder stymie,[9] and the Rule now makes it explicit that a court should consider modification of a judgment as an alternative to dismissal.[10] Needless to say, a court of appeals may also properly require suitable modification as a condition of affirmance.

Had the Court of Appeals applied Rule 19's criteria to the facts of the present case, it could hardly have reached the conclusion it did. We begin with the plaintiffs' viewpoint. It is difficult to decide at this stage whether they would have had an "adequate" remedy had the action been dismissed before trial for nonjoinder: we cannot here determine whether the plaintiffs could have brought the same action, against the same parties plus Dutcher, in a state court. After trial, however, the "adequacy" of this hypothetical alternative, from the plaintiffs' point of view, was obviously greatly diminished. Their interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum.

Opposing considerations in this case are hard to find. The defendants had no stake, either asserted or real, in

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[9] *E. g.*, Reed, *supra*, n. 2. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967). Compare *Roos* v. *Texas Co.*, 23 F. 2d 171.

[10] As the Committee Note points out, this principle meshes with others to be considered. An appropriate statement of the question might be "Can the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery?"

the joinder of Dutcher. They showed no interest in joinder until the Court of Appeals took the matter into its own hands. This properly forecloses any interest of theirs, but for purposes of clarity we note that the insurance company, whose liability was limited to $100,000, had or will have full opportunity to litigate each claim on that fund against the claimant involved. Its only concern with the absence of Dutcher was and is to obtain a windfall escape from its defeat at trial.

The interest of the outsider, Dutcher, is more difficult to reckon. The Court of Appeals, concluding that it should not follow Rule 19's command to determine whether, as a practical matter, the judgment impaired the nonparty's ability to protect his rights, simply quoted the District Court's reasoning on the Dead Man issue as proof that Dutcher had a "right" to be joined:

> " 'The subject matter of this suit is the coverage of Lumbermens' policy issued to Dutcher. Depending upon the outcome of this trial, Dutcher may have the policy all to himself or he may have to share its coverage with the Cionci estate, thereby extending the availability of the proceeds of the policy to satisfy verdicts and judgments in favor of the two Estate plaintiffs. Sharing the coverage of a policy of insurance with finite limits with another, and thereby making that policy available to claimants against the other person is immediately worth less than having the coverage of such policy available to Dutcher alone. By the outcome in the instant case, to the extent that the two Estate plaintiffs will have the proceeds of the policy available to them in their claims against Cionci's estate, Dutcher will lose a measure of protection. Conversely, to the extent that the proceeds of this policy are not available to the two Estate plaintiffs Dutcher will

> gain. . . . It is sufficient for the purpose of showing adversity [of interest] that it appears clearly that the measure of Dutcher's protection under this policy of insurance is dependent upon the outcome of this suit. That being so, Dutcher's interest in these proceedings is adverse to the interest of the two estate plaintiffs, the parties who represent, on this record, the interests of the deceased persons in the matter in controversy.' " [11]

There is a logical error in the Court of Appeals' appropriation of this reasoning for its own quite different purposes: Dutcher had an "adverse" interest (sufficient to invoke the Dead Man rule) because he would have been *benefited* by a ruling *in favor of* the insurance company; the question before the Court of Appeals, however, was whether Dutcher was *harmed* by the judgment *against* the insurance company.

The two questions are not the same. If the three plaintiffs had lost to the insurance company on the permission issue, that loss would have ended the matter favorably to Dutcher. If, as has happened, the three plaintiffs obtain a judgment against the insurance company on the permission issue, Dutcher may still claim that as a nonparty he is not estopped by that judgment from relitigating the issue. At that point it might be argued that Dutcher should be bound by the previous decision because, although technically a nonparty, he had purposely bypassed an adequate opportunity to intervene. We do not now decide whether such an argument would be correct under the circumstances of this case. If, however, Dutcher is properly foreclosed by his failure to intervene in the present litigation, then the joinder issue considered in the Court of Appeals

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[11] 218 F. Supp. 802, 805–806, quoted at 365 F. 2d 805.

vanishes, for any rights of Dutcher's have been lost by his own inaction.

If Dutcher is not foreclosed by his failure to intervene below, then he is not "bound" by the judgment in favor of the insurance company and, in theory, he has not been harmed. There remains, however, the practical question whether Dutcher is likely to have any need, and if so will have any opportunity, to relitigate. The only possible threat to him is that if the fund is used to pay judgments against Cionci the money may in fact have disappeared before Dutcher has an opportunity to assert his interest. Upon examination, we find this supposed threat neither large nor unavoidable.

The state-court actions against Dutcher had lain dormant for years at the pleading stage by the time the Court of Appeals acted. Petitioners assert here that under the applicable Pennsylvania vicarious liability law they have virtually no chance of recovery against Dutcher. We do not accept this assertion as fact, but the matter could have been explored below. Furthermore, even in the event of tort judgments against Dutcher, it is unlikely that he will be prejudiced by the outcome here. The potential claimants against Dutcher himself are identical with the potential claimants against Cionci's estate. Should the claimants seek to collect from Dutcher personally, he may be able to raise the permission issue defensively, making it irrelevant that the actual monies paid from the fund may have disappeared: Dutcher can assert that Cionci did not have his permission and that therefore the payments made on Cionci's behalf out of Dutcher's insurance policy should properly be credited against Dutcher's own liability. Of course, when Dutcher raises this defense he may lose, either on the merits of the permission issue or on the ground that the issue is foreclosed by Dutcher's failure to intervene in the present case, but Dutcher will

not have been prejudiced by the failure of the District Court here to order him joined.

If the Court of Appeals was unconvinced that the threat to Dutcher was trivial, it could nevertheless have avoided all difficulties by proper phrasing of the decree. The District Court, for unspecified reasons, had refused to order immediate payment on the Ciónci judgments. Payment could have been withheld pending the suits against Dutcher and relitigation (if that became necessary) by him. In this Court, furthermore, counsel for petitioners represented orally that they, the tort plaintiffs, would accept a limitation of all claims to the amount of the insurance policy. Obviously such a compromise could have been reached below had the Court of Appeals been willing to abandon its rigid approach and seek ways to preserve what was, as to the parties, subject to the appellants' other contentions, a perfectly valid judgment.

The suggestion of potential relitigation of the question of "permission" raises the fourth "interest" at stake in joinder cases, efficiency. It might have been preferable, at the trial level, if there were a forum available in which both the company and Dutcher could have been made defendants, to dismiss the action and force the plaintiffs to go elsewhere. Even this preference would have been highly problematical, however, for the actual threat of relitigation by Dutcher depended on there being judgments against him and on the amount of the fund, which was not revealed to the District Court. By the time the case reached the Court of Appeals, however, the problematical preference on efficiency grounds had entirely disappeared: there was no reason then to throw away a valid judgment just because it did not theoretically settle the whole controversy.

II.

Application of Rule 19 (b)'s "equity and good conscience" test for determining whether to proceed or

dismiss would doubtless have led to a contrary result below. The Court of Appeals' reasons for disregarding the Rule remain to be examined.[12] The majority of the

[12] Rule 19 was completely rewritten subsequent to the proceedings in the District Court in this case. There is, however, no occasion for separate consideration of the question whether the action of the Court of Appeals would have been proper under the old version of the Rule. The new version was adopted on July 1, 1966, while the appeal, in which the joinder question first arose, was pending. The majority in the Court of Appeals did not purport to rely on the older version, but on its conclusion that the Rule, in either form, had no application to this case. The dissent below found the Rule applicable, and concluded that the District Court should not be reversed on the basis of either version.

The new text of the Rule was not intended as a change in principles. Rather, the Committee found that the old text "was defective in its phrasing and did not point clearly to the proper basis of decision." This Court, having the ultimate rule-making authority subject to congressional veto, approved the Committee's suggestions. Where the new version emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing, the older version tended to emphasize classification of parties as "necessary" or "indispensable." Although the two approaches should come to the same point, since the only reason for asking whether a person is "necessary" or "indispensable" is in order to decide whether to proceed or dismiss in his absence and since that decision must be made on the basis of practical considerations, *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, and not by "prescribed formula," *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, the Committee concluded, without directly criticizing the outcome of any particular case, that there had at times been "undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions." An excellent example of the cases causing apprehension is *Parker Rust-Proof Co.* v. *Western Union Tel. Co.*, 105 F. 2d 976. Judge Swan, writing for a panel that included Judges L. Hand and A. N. Hand, stated that a nonjoined person was an "indispensable" party to a suit to compel issuance of a patent, but went on to say that "as the object of the rule respecting indispensable parties is to accomplish justice

court concluded that the Rule was inapplicable because "substantive" rights are involved, and substantive rights are not affected by the Federal Rules. Although the court did not articulate exactly what the substantive rights are, or what law determines them, we take it to have been making the following argument: (1) there is a category of persons called "indispensable parties"; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute.[13]

With this we may contrast the position that is reflected in Rule 19. Whether a person is "indispensable," that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation.[14] There is a large category, whose limits are not presently in question, of persons who, in the Rule's terminology, should be "joined

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between all the parties in interest, courts of equity will not suffer it to be so applied as to defeat the very purposes of justice." *Id.*, at 980. On this basis, the Court of Appeals reversed the District Court's dismissal of the action for nonjoinder. Under the present version of the Rule, the same result would be reached for, ultimately, the same reasons. The present version simply avoids the purely verbal anomaly, an indispensable person who turns out to be dispensable after all.

[13] One commentator has stated that "if this [the Court of Appeals position in the present case] is sound, amended Rule 19 would be invalid. But there is no case support for the proposition that the judge-made doctrines of compulsory joinder have created substantive rights beyond the reach of the rule-making power." 2 Barron & Holtzoff, Federal Practice & Procedure § 512, n. 21.14 (1966 Supp.) (Wright ed.).

[14] As the Court has before remarked, "[t]here is no prescribed formula for determining in every case whether a person . . . is an indispensable party . . . ." *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77, at 80.

if feasible," and who, in the older terminology, were called either necessary or indispensable parties. Assuming the existence of a person who should be joined if feasible, the only further question arises when joinder is not possible and the court must decide whether to dismiss or to proceed without him. To use the familiar but confusing terminology, the decision to proceed is a decision that the absent person is merely "necessary" while the decision to dismiss is a decision that he is "indispensable." [15] The decision whether to dismiss (*i. e.*, the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist. To say that a court "must" dismiss in the absence of an indispensable party and that it "cannot proceed" without him puts the matter the wrong way around: a court does not know whether a particular person is "indispensable" until it has examined the situation to determine whether it can proceed without him.

The Court of Appeals concluded, although it was the first court to hold, that the 19th century joinder cases in this Court created a federal, common-law, substantive right in a certain class of persons to be joined in the corresponding lawsuits.[16] At the least, that was not the

[15] The Committee Note puts the matter as follows: "The subdivision [19 (b)] uses the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors above mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it."

[16] Numerous cases in the lower federal courts have dealt with compulsory joinder, and the Court of Appeals concluded that princi-

way the matter started. The joinder problem first arose in equity and in the earliest case giving rise to extended discussion the problem was the relatively simple one of the inefficiency of litigation involving only some of the interested persons. A defendant being sued by several

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ples enunciated in those cases required dismissal here. However, none of the cases cited here or below presented a factual situation resembling this case: the error made by the Court of Appeals was precisely its reliance on formulas extracted from their contexts rather than on pragmatic analysis. Moreover, although the Court of Appeals concluded that the "distilled essence" of earlier cases is that the question whether to dismiss is "substantive" and that "Rule 19 does not apply to the indispensable party doctrine," it found no cases actually so holding.

One of the reasons listed by the Committee Note for the change in the wording of Rule 19 was "Failure to point to correct basis of decision." The imprecise and confusing language of the original wording of the Rule produced a variety of responses in the lower courts. In some cases a formulaic approach was employed, making it difficult now to determine whether the result reached was proper or not. Other cases demonstrate close attention to the significant pragmatic considerations involved in the particular circumstances, leading to a resolution consistent with practical and creative justice. For examples in the latter category, see *Roos* v. *Texas Co.*, 23 F. 2d 171 (C. A. 2d Cir.) (L. Hand, J.) (decided prior to adoption of Fed. Rules Civ. Proc.); *Kroese* v. *General Steel Castings Corp.*, 179 F. 2d 760 (C. A. 3d Cir.) (Goodrich, J.); *Stevens* v. *Loomis*, 334 F. 2d 775 (C. A. 1st Cir.) (Aldrich, J.). It is interesting that the only judicial recognition found by the Court of Appeals of its view that indispensability is a "substantive" matter is a footnote in the last-cited case attributing to the (then) proposed new formulation of Rule 19 "the view that what are indispensable parties is a matter of substance, not of procedure." *Id.*, at 778, n. 7. Taken in context, Judge Aldrich's statement refers simply to the view that a decision whether to dismiss must be made pragmatically, in the context of the "substance" of each case, rather than by procedural formula. The statement is hardly support for the proposition that a court of appeals may ignore Rule 19's command to undertake a practical examination of circumstances.

cotenants objected that the other cotenants were not made parties. Chief Justice Marshall replied:

> "This objection does not affect the jurisdiction, but addresses itself to the policy of the Court. Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the Court itself, and is subject to its discretion. . . . [B]eing introduced by the Court itself, for the purposes of justice, [the rule] is susceptible of modification for the promotion of those purposes. . . .
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> "In the exercise of its discretion, the Court will require the plaintiff to do all in his power to bring every person concerned in interest before the Court. But, if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the Court cannot reach . . . ought not to prevent a decree upon its merits." [17]

Following this case there arose three cases, also in equity, that the Court of Appeals here held to have declared a "substantive" right to be joined. It is true that these cases involved what would now be called "substantive" rights. This substantive involvement of the absent person with the controversy before the Court was, however, in each case simply an inescapable fact of the situation presented to the Court for adjudication. The Court in each case left the outsider with no more "rights" than it had already found belonged to him. The question in each case was simply whether, given the substantive involvement of the outsider, it was proper to proceed to adjudicate as between the parties.

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[17] *Elmendorf* v. *Taylor*, 10 Wheat. 152, at 167–168.

The first of the cases was *Mallow* v. *Hinde*, 12 Wheat. 193, in which, in essence, the plaintiff sought specific performance of a contract to convey land, but sought it not against his vendor (who could not be joined) but against a person who claimed through an entirely different chain of title. The Court saw that any declaration of rights between the parties before it would either purport (incorrectly) to determine the validity of plaintiff's contract with his grantor, or would decide nothing. The Court said, in language quoted here by the Court of Appeals:

> "In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties. . . .
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> "We do not put this case upon the ground of jurisdiction, but upon a much broader ground. . . . We put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court." [18]

Nothing in this language is inconsistent with the Rule 19 formulation, or otherwise suggests that lower courts

[18] 12 Wheat., at 198, quoted at 365 F. 2d 806. The facts were that T, a trustee of land for the benefit of certain persons, may or may not have conveyed legal title to defendant Hinde. Plaintiff Mallow claimed equitable title by virtue of an executory agreement between the trust beneficiaries and one Langham, who conveyed to plaintiff. Mallow sued Hinde to compel conveyance of the legal title, but T and the beneficiaries could not be joined. Hinde contended that the beneficiaries had no power to sell to Langham, and that the purported contract had, in any event, been obtained by fraud.

are expected to proceed without examining the actual interest of the nonjoined person. As the Court explicitly stated, there is no question of "jurisdiction" and there can be no binding adjudication of a person's rights in the absence of that person. Rather, the problem under the circumstances was that the substantive involvement of the grantor was such that in his absence there was nothing for the Court to decide.

The second case relied upon by the Court of Appeals, *Northern Indiana R. R.* v. *Michigan Central R. R.*, 15 How. 233, presents a different aspect of joinder. There suit was brought for an injunction against construction by defendant of a railroad that it was under contract to a nonjoinded outsider to build. Thus the plaintiff was seeking equitable relief that would, in practice, abrogate the contractual rights of a nonparty. Among the unpleasant possibilities entailed by proceeding was the likelihood that the defendant might find itself subject to directly conflicting injunctive orders. The Court ruled that,

> ". . . in a case like the present, where a court cannot but see that the interest of the New Albany Company must be vitally affected, if the relief prayed by the complainants be given, the court must refuse to exercise jurisdiction in the case, or become the instrument of injustice." [19]

Again, the Court of Appeals' reliance on this language to show that in *any* case where an outsider "may be affected" it is necessarily unjust to proceed, is altogether misplaced: the Court in *Northern Indiana* simply found that there would be injustice in proceeding given the particular factual and legal situation before it. Neither Rule 19, nor we, today, mean to foreclose an examination in future cases to see whether an injustice is being, or might be, done to the substantive, or, for that matter,

[19] 15 How., at 246, quoted at 365 F. 2d 806.

constitutional, rights of an outsider by proceeding with a particular case. In this instance, however, no such examination was made below, and no such injustice appears on the record here.

The most influential of the cases in which this Court considered the question whether to proceed or dismiss in the absence of an interested but not joinable outsider is *Shields* v. *Barrow*, 17 How. 130, referred to in the opinion below. There the Court attempted, perhaps unfortunately, to state general definitions of those persons without whom litigation could or could not proceed. In the former category were placed

> "persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties." [20]

The persons in the latter category were

> "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." [21]

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[20] 17 How., at 139.

[21] *Ibid.* Plaintiff was suing for rescission of a contract but was unable to join some of the parties to it. Reed, *supra*, n. 2, comments that much later difficulty could have been avoided had this Court pointed the way in *Shields* by undertaking a practical exam-

These generalizations are still valid today, and they are consistent with the requirements of Rule 19, but they are not a substitute for the analysis required by that Rule. Indeed, the second *Shields* definition states, in rather different fashion, the criteria for decision announced in Rule 19 (b). One basis for dismissal is prejudice to the rights of an absent party that *"cannot"* be avoided in issuance of a final decree. Alternatively, if the decree can be so written that it protects the interests of the absent persons, but as so written it leaves the controversy so situated that the outcome may be inconsistent with "equity and good conscience," the suit should be dismissed.

The majority of the Court of Appeals read *Shields* v. *Barrow* to say that a person whose interests "may be affected" by the decree of the court is an indispensable party, and that all indispensable parties have a "substantive right" to have suits dismissed in their absence. We are unable to read *Shields* as saying either. It dealt only with persons whose interests must, unavoidably, be affected by a decree and it said nothing about substantive rights.[22] Rule 19 (b), which the Court of Appeals dismissed as an ineffective attempt to change the substantive rights stated in *Shields*, is, on the contrary, a valid statement of the criteria for determining whether to proceed or dismiss in the forced absence of an inter-

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ination of the facts. *Id.*, at 340–346. He concludes that "The facts in the opinion are insufficient to demonstrate that the result is a just one." *Id.*, at 344. See also Kaplan, *supra*, n. 9, at 361.

[22] Indeed, for example, it has been clear that in a diversity case the question of joinder is one of federal law. *E. g., DeKorwin* v. *First Nat'l Bank*, 156 F. 2d 858, 860, citing *Shields*. To be sure, state-law questions may arise in determining what interest the outsider actually has, *e. g., Kroese* v. *General Steel Castings Corp.*, 179 F. 2d 760 (C. A. 3d Cir.), but the ultimate question whether, given those state-defined interests, a federal court may proceed without the outsider is a federal matter.

ested person. It takes, for aught that now appears, adequate account of the very real, very substantive claims to fairness on the part of outsiders that may arise in some cases. This, however, simply is not such a case.

III.

The Court of Appeals stated a second and distinct ground for reversing the District Court and ordering dismissal of the action. It will be recalled that at the time the present declaratory judgment action came to trial two tort actions were pending in the state courts. In one, the estate of the deceased truckdriver, Smith, was suing the estate of Cionci, as tortfeasor, plus Dutcher, on the theory that Cionci was doing an errand for him at the time of the accident, plus Lynch's estate, on the theory that Lynch had been in "control" of Cionci. Harris, the injured passenger, was suing the same three defendants on the same theories in a separate action. The Court of Appeals concluded that since these actions "presented the mooted question as to the coverage of the policy," the issue presented in the present proceeding, the District Court should have declined jurisdiction in order to allow the state courts to settle this question of state law.

We believe the Court of Appeals decided this question incorrectly. While we reaffirm our prior holding that a federal district court should, in the exercise of discretion, decline to exercise jurisdiction over a diversity action raising issues of state law when those same issues are being presented contemporaneously to state courts, *e. g.*, *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, we do not find that to be the case here.

This issue, like the joinder issue, was not raised at trial. While we do not now declare that a court of appeals may never on its own motion compel dismissal of an action as an unwarranted intrusion upon state

adjudication of state law, we do conclude that, this being a discretionary matter, the existence of a verdict reached after a prolonged trial in which the defendants did not invoke the pending state actions should be taken into consideration in deciding whether abstention is the wiser course.

It can hardly be said that Lynch's administrator, the plaintiff and petitioner in this case, would have had a satisfactory opportunity to litigate the issue of Cionci's permission in the state actions. The Court of Appeals said that "all the persons involved in the accident were parties" to the state-court actions. If the implication is that the state actions could have resulted in judgments in favor of Lynch's estate and against the insurance company on the issue of Cionci's permission, this implication is not correct. The insurance company was not a party to the tort actions, and was not defending Cionci's estate. Lynch's estate was a party only in the sense that Lynch's personal representative (a different person from Lynch's administrator, the plaintiff in this case) was made a defendant in tort. Furthermore, the Smith and Harris actions against Cionci had nothing to do with the issue of insurance coverage: had Smith or Harris won a judgment against Cionci's estate, they would have had to bring a further action against the insurance company; this further action could well have been brought in a federal court. In short, the net result of abstention here would presumably have been a diversity action identical with this one, except that Lynch's estate would have been compelled to wait upon the convenience of plaintiffs over whom it had no control, and would have been dependent upon a victory by those plaintiffs in a suit in which it was a defendant.

The issues that were before the state courts in the tort actions were not the same as the issues presented by this case. To be sure, a critical question of fact in

both cases was what Ducher said to Cionci when he gave him the keys. But in the state-court actions the ultimate question was whether Cionci was acting as Dutcher's agent, thus making Dutcher personally liable for Cionci's tort. In this case the question was simply whether Cionci had "permission," thus bringing Cionci's own liability within the coverage of the insurance policy. Resolution of the "agency" issue in the state court would have had no bearing on the "permission" issue even if that resolution were binding on Lynch's estate. Furthermore, although the state court would have had (and still will have, if the cases are ever tried) to rule whether or not Dutcher may testify against the estates under the Dead Man Rule, this question is also a different one in the state and federal cases. In the state cases, Dutcher was a defendant, and the question would be whether he could testify in defense against his own liability. In the present case the question was rather whether he could testify, as a nonparty, on the coverage of his insurance policy.

We think it clear that the judgment below cannot stand. The judgment is vacated and the case is remanded to the Court of Appeals for consideration of those issues raised on appeal that have not been considered, and, should the Court of Appeals affirm the District Court as to those issues, for appropriate disposition preserving the judgment of the District Court and protecting the interests of nonjoined persons.

It is so ordered.